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A

Selection of Rules

OCCURRING IN THE

PROSECUTION AND DEFENCE

OF

Personal Actions

IN THE COURT OF

King's Bench;

WITH

NOTES ON EACH RULE,

ILLUSTRATIVE OF THE

Practice of the Court.

BY

WILLIAM HANDS,

One of the Attornies of the Court.

LONDON:

PRINTED FOR E. AND R. BROOKE,

BELL-YARD, TEMPLE-BAR.

M.DCC.XCV.

BIBLIOTHECA ROYALE

PREFACE.

THE following *Selection* of *Rules* is part of a collection originally made by the compiler in the courſe of his practice, for his own private uſe: but as they appeared to him, in ſome meaſure, to ſhew what is the *preſent* practice of the court in which they were made, he conceived they would be ſerviceable to the profeſſion; and in order to make them as much ſo as was in his power, he has added ſuch *Notes* thereon as thirteen years conſtant practice in town has enabled him *, and which he preſumes will, in general, appear correct, at leaſt he has done his endeavours to make them ſo; and therein will be found interſperſed a few *caſes* in *points* of *practice* not in print.

* The compiler was articled in London (where he ſerved his clerkſhip, and has ever ſince practiſed) in Tri. vac. 1782; admitted in the courts of King's Bench and Common Pleas in Hil. Term, 1790, and in the court of Chancery in the Tri. vac. following.

And the compiler's aim in this ſelection being to aſſiſt the *junior* part of that branch of the profeſſion of which he is himſelf a member, in acquiring a competent knowledge of the *practice* of the court of *King's Bench*, he now dedicates the whole to them; hoping it may contribute towards enabling them to make the remark of the very inſtructive writer of a late publication *, who ſeems to think that "formerly the attorney of a court "knew the practice of his court, but that now, "he knows *nothing* of the matter," leſs applicable in future than it has hitherto been; and which obſervation, with the one of a celebrated noble writer's †, that "every man is a *debtor* "to his profeſſion," induced the compiler to offer his, the preſent Selection.

He therefore truſts they will view this attempt to aſſiſt the junior part of them with their accuſtomed *indulgence*; eſpecially as it ſeems the *ſmalleſt* acquiſition of legal knowledge is by no means to be conſidered as a matter of contempt ‡; and ſhould it prove in any degree uſeful, the end for which it was compiled will be attained.

Mark Lane, London,
2d October, 1795.

W. HANDS,

* The Barriſter. † Lord Bacon.
‡ Simpſon's Reflections, by Dawes.

TABLE

TABLE

OF THE

CONTENTS.

RULES.

Page

Nisi and absolute to discharge a privileged person from an arrest, on filing common bail — — — 1, 2

. . . . . for an attorney to put in and perfect bail pursuant to his undertaking — — — 10

To return the writ — — — 12

. . . bring in the body — — 15

For an attachment against the sheriff for not bringing in the body — — 16

Allowing bail — — — 20

For time to declare — — 22

. . . further time to declare — — ib.

. . . the plaintiff peremptorily to declare ib.

To discontinue — — — 25

. . . . . as to one defendant — ib.

Page
To change the venue — — — 28
... bring back the venue — — 31
Niſi and abſolute to conſolidate — 33, 34
..... ſet aſide a judgement and execution levied thereon, for irregularity, with coſts — — 37
..... regular interlocutory judgement, and ſubſequent proceedings thereon, upon payment of coſts — — — 42
..... refer it to the maſter to calculate the principal and intereſt on a note of hand (or bill of exchange); and for the plaintiff to be at liberty to ſign final judgement thereon, without executing a writ of inquiry of damages — 45
To pay money into court — — 48
... plead ſeveral matters — — 55
For the defendant to abide by his plea — 57
To compound in a qui tam action — 59
The like — — — ib.
The like — — — 60
For a concilium — — — 63
... judgement on demurrer, &c. — ib.
... a ſpecial jury — — — 65
.... view — — — 63
... coſts for not proceeding to trial purſuant to notice — — — 71

Page

Niſi and abſolute diſcharging the ſame — 71
... for judgement, as in the caſe of a non-ſuit — — — — 74
Diſcharging the ſame on a peremptory undertaking to try — — — ib.
Abſolute for judgement, as in the caſe of a nonſuit, on hearing both parties — 75
The like, no caſe ſhewn — — ib.
Niſi and abſolute to ſet aſide a nonſuit (or verdict) and for a new trial thereon — 79
Diſcharging a rule niſi to ſet aſide a non-ſuit (or verdict) with coſts — ib.
Niſi and abſolute to arreſt the judgement 85
..... retain the damages and coſts in one action towards ſatisfaction of the debt and coſts in another between the ſame parties — — — 88
To make an order of niſi prius a rule of court — — — 91
... enlarge the time for the arbitrator's making his award — — 93
... be preſent at taxing coſts — — 97
Niſi and abſolute to ſtay the proceedings againſt bail pending a writ of error — 99
For the marſhal to acknowledge the defendant in his cuſtody — — 103
To bring the defendant up to be diſcharged under the lords act, in the country — 105

Page
The like in town — — 106
To remand him till a future day thereon ib.
... diſcharge him — — — 107
... bring the defendant up to aſſign his effects under the compulſive clauſe in the lords act — — — 115
For an attorney to anſwer the matters of complaint in an affidavit — — 125
Enlarging the time to anſwer it — ib.
Diſcharging it, on the attorney's paying certain coſts — — — ib.
To enter up judgement on an old warrant of attorney — — — 129

WITH

NOTES

ON EACH RULE.

NAMES

NAMES OF THE CASES CITED.

Such of the Caſes in this Selection, the Names of which are printed in *Italics*, are only the Compiler's own Notes.

	Page
ALCHIN againſt Wells, — — —	14
Allen v. Griffiths, — — — —	28
Anderſon v. George — — —	82
Baillie againſt Cazelet, — — —	51
Bailly v. Wilkinſon, — — —	77
Barker, widow, &c. v. Braham and another, —	40
Baſkerville v. Brown, — — —	89
Belcher v. Ganſell, — — —	126
Bennett, adminiſtrator, &c. v. Coker, — —	26
Bevan v. Bevan, — — — —	7
Benwell v. Black, — — —	102
Bickley v. *Tucker*, — — —	111
Birt v. Barlow, — — — —	83
Bland v. Darley, — — — —	63
Bright, executor, &c. v. Eynon, — —	82
Brooke, Lord, v. Stone, — — —	13
Brown v. Baſkerville, — — —	89
. . . . qui tam, v. Bailey, — — —	62
Bruckſhaw v. Hopkins, — — —	32
Butt v. Mow, — — — —	101
Cameron et al. againſt Reynolds, —	87, 128
Capron v. Archer, — — —	100

Carter

Page

Carter v. Roberts, — — — — 101
Cates, who, &c. v. *Carrington*, — — 61
. . . . . *Kemp*, — — — 61
. . . . . *Knight*, — — — 86
. . . . . *Marſh*, — — — 61
. . . . . *Melliſh*, — — — 73, 86
. . . . . *Palmer*, — — — 77
. . . . . *Winder*, — — — 73, 81
Cavil v. Burnaford et al. — — — 43
Cecil v. Brigges, bart. — — — 36
Same v. Same, — — — — 36
Chriſtie v. Richardſon, — — — 102
Cockran v. Robertſon, — — — 58
Cope and another v. Cooke, — — 7
Cox and another, executors, &c. v. Parry, — 51
Crozier v. Storke, — — — — 55, 56

Davies againſt Cottle, — — — 77
De Moranda and others v. Dunkin and others, — 13

Edie and another againſt the Eaſt India Company, — — — — — 84
Edwards v. Blunt, — — — — 87
Entwiſtle and others v. Shepherd and others, — 101
Evans v. Gilbert, — — — 101

Fiſher againſt Bull, — — — 111
. . . . . Stanhope, — — — 104
Forbes v. Lord Middleton, — — — 43, 64
Ford v. Gainer, — — — — 30
Foſter v. Snow, — — — — 58
. . . . . Taylor, — — — — 29
Fox v. Glaſs, — — — — 43
Froſt v. *Woolcombe*, — — — — 90

Page
Gravett againſt Williams, — — — 19
Griffith v. Walker, — — — 32
Griffiths v. Williams, — — — 49, 51
. . . . Jones, on the demiſe of, v. Marſh, — 5

Hall againſt Buchannan, — — — 76
Hand v. Lady Dinely, — — — 53
Hallett, eſq; and others v. the Eaſt India Company, — — — — 50
Hare v. Lloyd, — — — 58
Harris, executor, &c. v. Jones, — — 26
Harriſon v. Grote, — — — 102
Hart, qui tam, v. Hawkins, — — 107
Hartley and others v. Bateſon and others, — 52
Heathfield v. Chilton, — — — 7
Heyrick v. Foſter, — — — 56
Highnam and another, executors, &c. v. Haſſell 96
Hill v. Bolt, — — — — 19
Hodſon v. Richardſon, — — — 36
Holiday, et al. v. Colonel Pitt, — — 3
Holmes v. White, — — — 23
Hutchins v. Hird, — — — 15
Hutton and Wife v. Bolton, — — 50

Jacks v. Pemberton and another, — — 7
J'ans, qui tam, v. Hutton, — — 23
Jenkins v. Edwards, — — — 56
Jennings, qui tam, v. Wilſon and others, — 78
Johnſon v. Houlditch, — — — 54
Jones v. Concannon, — — — 78
Jupp, Doe ex dim. v. Andrews, — — 127

Kabell againſt Hudſon, — — 51, 52, 53
Kempland v. Macauley and another, — 101, 102
Kerſhaw v. Cartwright and another, — 101

Page
King v. Pippett, — — — 78
. . . . qui tam, v. Clifton, — — 49, 62
King, the, v. Adderley, — 14, 15, 19
. . . . . Addington, — — 94
. . . . . Cotes, — — — 13
. . . . . the Sheriff of Cornwall, in the cauſe of Daw and Smith, — 12
. . . . . Franklin, — — 41
. . . . . Harris et al. — — 30
. . . . . Hart, eſq; — — 67
. . . . . Holt, — — — 80, 83
. . . . . Jones, — — — 14, 39
. . . . . the Sheriff of Middleſex, in the cauſe of Robins v. Hall, — 8, 16
. . . . . the like, Metcalfe v. Aylett, — 16, 21
. . . . . Perry and others, — — 67
. . . . . Peters et al. — — 43
. . . . . Smithies, — — 5, 13, 17
. . . . . Wallace, — — — 8, 17
. . . . . Wheeler, — — 96
. . . . . White and another, — — 87

Lakin againſt Dewall, — — 40
Law v. Smith, — — — 101
. . . qui tam, v. Crowther, — — 56
Le Breton v. Braham, — — 50
Lench v. Pargiter, — — 109, 112
Levett v. Perry, — — — 102
Lorymer v. Holliſter, — — 11

Maclellan againſt Howard, — — 56
Malcolm and another, aſſignees, &c. v. Fullarton, — — — 54, 95
Marder v. Cox, — — — 96
. . . . and Wife v. Lee, — — 129

Maſterman

Page
Maſterman v. Grant, — — — 101
Maughan, qui tam, v. Walker, — — — 61
Merrick and another v. *Holles*, — — — 4
Mewburn v. Langley, — — — 78
Mitchell v. Oldfield, — — — 89, 90
Montpeſſon v. Randle, — — — 82
Morgan v. Luckup, — — — 56
Munt and another v. Tremamondo, — — 78
Mylock v. Saladine, — — — 29

Newton againſt Swymmer, — — 102

Owen againſt Hurd, — — — 8

Pechey againſt Harriſon, — — — 86
Palmer v. Wadbrooke, — — — 56
Pearſe, eſq; v. the Earl of Faulconberg and others, 69
Penny v. Harvey, — — — 23
Petre v. White, — — — 40
Petyt v. Berkley, eſq; — — — 29, 30
Phillips v. Biron, et al. — — — 40
..... and others, Doe on the demiſe of, v. Moſes, 76
Pitt v. Yalden, — — — 127
Pochin v. Pawley, — — — 80, 82
Pool v. Charnock, — — — 101
Poole, the Mayor of. v. Bennet, — — 29

Read againſt Dupper, — — — 90
Rice v. Shute, — — — 80
Richardſon v. Jelly, — — 103
Rogers v. Reeves, — — — 11
Ruſſell v. Stewart, — — — 22

Shepherd againſt Charter, — — — 46
Shortridge v. Hiern, — — — 78
Smith v. Muller, — — — — 95

Page

Smith v. Painter, — — — — 40
..... Shepherd, — — — 30
Stackey v. Peel, — — — — 18, 19
Stevenſon v. Yorke, — — — 53
Stodhart v. Johnſon, — — — 53
Sutton v. Biſhop, — — — — 86
Swinglehurſt v. Altham and another, — 96
Symonds v. Parmenter and another, — 26

Taylor againſt Whitehead, — — 87
Tomſon v. Browne, — — — 40
Todd v. Dodd, — — — 130

Waddington againſt Thellwell, eſq; — 28
Watkins v. Towers and others — 28, 32, 50
Watſon, qui tam, v. Jackſon and others, — 77, 78
Webb v. Holt, — — — 58
Welch v. Hole, — — — 90
Weller v. Goyton and another, — — 78
White v. *Heard*, — — — — 110
Wills v. Crabb, — — — 89
Wilſon v. Raſtall, — — — — 80
Wood v. Webb, — — — — 17
Woolcombe v. *Froſt*, — — 7, 39, 54, 90
Werley v. Lee, — — — 23

RULES

RULES IN PERSONAL ACTIONS

IN THE

KING'S BENCH.

(a) *Tueſday next after three Weeks from Eaſter Day, in the 33d Year of King George the Third.*

P. and another, (b)
D. (c) } UPON reading the affidavit of the *defendant*, (1) It is ordered, that the *plaintiffs*, upon notice of this rule to be given to their attorney, ſhall, upon *Thurſday next after three Weeks from Eaſter day*, ſhew cauſe why the *defendant* ſhould not be diſcharged

Niſi, to diſcharge a privileged perſon on filing common bail.

(1) Of the facts.

(a) All rules are thus intitled, on the day they are made.

(b) The plaintiff's name always ſtanding firſt in the rule, the word "againſt" becomes uſeleſs, and is omitted.

(c) In this Selection the letter "P." is in general uſed for the plaintiff's name, and the letter "D." for the defendant's.

out of the cuſtody of *the ſheriff of the county of Middleſex*, as to this action, upon filing common bail; and why the *plaintiffs* ſhould not pay the coſts of this application, to be taxed by the maſter—upon the motion of Mr. *Manley*.

By the Court (*d*).

(*d*) Theſe words are ſigned by the clerk of the rules, on the right hand ſide of the foot of every rule.

Abſolute thereon.

P. and another, } UPON reading the rule
D. } made in this cauſe, on *Tueſday next after three weeks from Eaſter day in this term*, and upon hearing Mr. *Lambe* of counſel for the *plaintiffs*, and Mr. *Erſkine* of counſel for the *defendant*; It is ordered, that the *defendant* be diſcharged out of the cuſtody of *the ſheriff of the county of Middleſex*, as to this action, upon filing common bail; and that ſo much of the ſaid rule as relates to the

plaintiffs paying the coſts of this application be diſcharged.

I certify, that an appearance was entered in the within-named cauſe, the 27th of April 1793. Certificate of the appearance.

JOHN YATES, Dep. Phil.

IN caſes where privileged perſons * are arreſted, it is a motion of courſe, on a ſhort affidavit of the facts, for a rule niſi to diſcharge them; and in ſuch of the caſes as common bail is required on the diſcharge, a rule niſi to the above effect will be granted, which, whether cauſe be ſhewn or not, if it clearly appears that the party is intitled to privilege, will, either on ſhewing cauſe, or on an affidavit of the ſervice of the rule niſi, if no cauſe is ſhewn, be made abſolute, but not commonly with coſts †.

As where one of his majeſty's ſervants in ordinary, namely, the gentleman of the buttery, had been arreſted; on the motion of Mr.

* Sellon's Pr. 55. Tidd's Pr. 92. and Impey's Pr. 66. 2d ed.

† And ſee Holiday et al. v. Col. Pitt, 2 Stra. 985.

Manley, the above rule niſi was granted to diſcharge him; which was afterwards, on hearing Mr. Lambe againſt it, made abſolute, but without coſts, and the laſt of the above rules was drawn up thereon*.

So theſe rules may in like manner be obtained to diſcharge a defendant on his being arreſted, where it appears from the affidavit to hold to bail that he is not liable to give ſpecial bail, or that the affidavit is defective†, as if the defendant be arreſted in any of the other caſes enumerated in the books of practice, where it is held he cannot legally be held to bail ‡; or if the affidavit be not ſufficiently poſitive, or does not ſhew a ſubſiſting debt, or how it aroſe, or is inaccurate, or if ſeparate actions are included in the ſame affidavit §.

When the abſolute rule is drawn up, if common bail be required, it ſhould be filed with the clerk of the common bails, if the action is by bill; but if by original, an appearance ſhould be entered with the filazer, who will

* Merrick and another v. Holles, E. T. 33d Geo. III.

† 2d Wynne's Eunomus, 136, 2d ed.

‡ Sellon's Pr. 38. Tidd's Pr. 28. and Impey's Pr. 59, 2d ed.

§ Sellon's Pr. 110. Tidd's Pr. 39. and Impey's Pr. 68, 2d ed.

thereon

thereon give a certificate thereof, at the foot or on the back of the rule, to the above effect, and then a copy of the rule and certificate ſhould be ſerved at the ſheriff's office, and the originals ſhewn at the time of the ſervice; when directions will be given to the officer in whoſe cuſtody the defendant may be, to diſcharge him accordingly.

The above rule niſi ſhould be ſerved as all other rules are that require ſervice, and are not for the purpoſe of bringing the party into contempt in caſe of his diſobedience to the rule, for theſe muſt be ſerved on the party perſonally, and the original ſhewn to him at the time of the ſervice *; but ſuch of the rules in this Selection as are of the former deſcription ſhould be ſerved on the attorney (in a town cauſe, but on the agent in a country one) of the adverſe party, either by delivering a copy of it to him perſonally, or leaving it with his clerk or ſervant at his dwelling-houſe †, office, or chambers, and ſhewing the original to the perſon on whom it is ſerved at the ſame time; or by leaving a copy of it at the laſt

* The King v. Smithies, 3 Term Rep. 351.

† Jones on the demiſe of Griffiths v. Marſh, 4 Term Rep. 464.

place entered in the alphabetical book kept at the maſter's office for entering the reſidence or place where attornies reſident in town, or within ten miles of it, may be ſerved with notices, ſummonſes, orders and rules. But if there be no ſuch entry on the book, then the fixing up of the copy in the maſter's office is ſufficient ſervice *; and a board is put up againſt the ſide wall in the open part of the King's Bench office, adjoining the maſter's rooms, for the fixing up of the ſame.

Accordingly where an attorney had entered his place of reſidence in the book, and afterwards removed; and before he had altered the entry a demand of a plea, which required to be ſerved on him as agent for the defendant, was ſtuck up in the office, inſtead of being left at the place entered in the book; and for want of a plea judgment was ſigned; and it being an action of debt on bond, a fieri facias was iſſued, and levied on the defendant's effects: the court, on the motion of Mr. Mingay, granted a rule niſi to ſet aſide the proceedings with coſts for this irregularity; and which afterwards, on

* Order H. T. 1768.

hearing

hearing Mr. Erſkine againſt it, was made abſolute *.

It may not be improper here to obſerve, that though where an affidavit is neceſſary in ſupport of the motion for any of the rules in this Selection, it is in theſe notes recommended to be ſhort; yet the writer only means that prolixity ſhould be avoided: for as it is the rule of this court not to receive any ſupplementary affidavit †, care muſt be taken to inſert every thing in it material to the point in queſtion; but then, on the other hand, it ſhould contain nothing more, and if it does not, it will in general be ſhort.

The true place of abode and addition of the deponent muſt be inſerted in the affidavit ‡, and the body of it ſhould not only be accurately drawn, but the title at the head of it muſt be correct; for if the title be omitted, the affidavit cannot be read §, nor can the

* Woolcombe v. Froſt, M. T. 27th Geo. III. See the rules, poſt.

† Heathfield v. Chilton, 4 Burr. 2015; Cope and another v. Cooke, Doug. 450; and Jacks v. Pemberton and another, 5 Term Rep. 552.

‡ Order M. T. 1663.

§ Bevan v. Bevan, 3 Term Rep. 601.

court take any notice of it, even though the adverſe party ſhould be willing to waive the objection*; accordingly where the affidavit was intitled improperly, the court held the proceedings founded on it irregular†; and it may be obſerved, that though an affidavit of the cauſe of action, before proceſs ſued out, in order to hold the defendant to bail, may be regularly ſworn before a commiſſioner, although he be concerned as attorney for the plaintiff‡, yet no other affidavit can be ſworn before the attorney for the party on whoſe behalf it is made; for if it is, it will be irregular§, and cannot be read‖.

And now, if the affidavit be taken by a commiſſioner, and the perſon making it appears from his or her ſignature to be illiterate, the commiſſioner muſt ſtate in the jurat, that "The affidavit was read in his preſence to the party making the ſame, and that ſuch

* Owen v. Hurd, 2 Term Rep. 643.

† The King v. the Sheriff of Middleſex, in the cauſe of Robins v. Hall, 3 Term Rep. 133.

‡ Order E. T. 1742.

§ Ibid.

‖ The King v. Wallace, 3 Term Rep. 403.

party

party ſeemed perfectly to underſtand the ſame; and alſo, that the ſaid party wrote his or her ſignature in the preſence of the commiſſioner taking the ſaid affidavit *."

* Order E. T. 1791.

UPON

Niſi for an attorney to put in and perfect bail, purſuant to his undertaking.

(1) Of the facts.

P. } UPON reading the affidavit of *A. B.* (1) It is ordered, that Mr. *E. F.* upon notice of this rule to be given to him or his agent, ſhall, upon *the morrow*, ſhew cauſe why he ſhould not forthwith put in and perfect bail for the *defendant* on the writ of *alias teſtatum ſpecial capias* iſſued in this cauſe, purſuant to his undertaking—upon the motion of Mr. *Shepherd.*

Abſolute thereon.

(1) Rule niſi.

(2) Of the ſervice of the rule niſi.

P. } UPON reading the rule made in this cauſe, on *Wedneſday*, [*&c.*] (1) the affidavit of *G. H.* (2) and upon hearing counſel as well for Mr. *E. F.* in the ſaid rule named, as for the *plaintiff*; It is ordered, that the ſaid Mr. *F.* do forthwith put in and perfect bail for the *defendant* on the writ of *alias teſtatum ſpecial capias*, iſſued in this cauſe, purſuant to his undertaking—upon the motion of Mr. *Shepherd* for the *plaintiff*, and Mr. *Erſkine* for Mr. *F.*

IF an attorney undertake to put in bail for the defendant, the court will oblige him to fulfil

fulfil his undertaking, even though he may have been impoſed upon by the bailiff *; and it is of courſe on the application of the *plaintiff* to compel him †. And the court will, on ſuch an application, ſupported by a ſhort affidavit of the facts, grant this rule niſi, and afterwards make it abſolute on an affidavit of ſervice, or upon ſhewing cauſe, if the fact of the undertaking be clear, and then the abſolute rule thereon is drawn up to the above effect.

* Lorymer v. Holliſter, 1 Stra. 693.
† Rogers v. Reeves, 1 Term Rep. 418.

To return the writ.

(1) Or "late."

(2) Or "latitat, &c."

P. *D.* IT is ordered, that the (1) *ſheriff* of the *county of Surrey* ſhall, within *ſix* days next after notice of this rule to be given to *his under-ſheriff*, peremptorily return the writ of *ſpecial capias* (2) iſſued between the parties.

Side bar.

IF the ſheriff does not return the writ without, which it is not cuſtomary to do, this rule may iſſue on the return day of the writ, by bill, and on the quarto die poſt by original; and to prevent delay it is uſual then to obtain it, but the rule cannot regularly iſſue before*; and it may be had (like all other ſide-bar rules) of courſe at the clerk of the rules' office, without either a motion in court, or the ſignature of counſel.

This rule, as well as the ſubſequent one to bring in the body, being for the purpoſe of bringing the ſheriff into contempt in caſe of his diſobedience to the rule, it muſt either be ſerved on the under-ſheriff himſelf, or on the clerk or agent at the under-ſheriff's office, and

* The King v. the Sheriff of Cornwall, in the cauſe of Daw and Smith, 1 Term Rep. 552.

ſervice

ſervice of it on the under-ſheriff's agent in town is not good ſervice*, neither is it on one of the under-ſheriff's domeſtics, as a maid ſervant†; and the original rule muſt be ſhewn at the time of the ſervice‡.

In a town cauſe, *i. e.* on an arreſt in London or Middleſex, this rule, as well as the one to bring in the body, is a four day rule§, excluſive of the day of the ſervice‖; but in a country cauſe, *i. e.* on an arreſt in any other city or county than London or Middleſex, it is a ſix day rule, and the writ muſt now be actually returned on the day the rule expires; and in default thereof the plaintiff is at liberty to move for an attachment on the next day¶.

But the rule cannot regularly iſſue if the plaintiff has taken an aſſignment of the bail bond†, nor if the ſheriff appoint a ſpecial bailiff to execute it at the plaintiff's requeſt**,

* The King v. Coles, Doug. 404.
† Loft, 301.
‡ The King v. Smithies, 3 Term Rep. 351.
§ Order T. T. 1766. See 3d Burr. 1921.
‖ Loft, 631.
¶ Order M. T. 1791.
† Lord Brooke v. Stone, 1. Wil. 223. 4th ed.
** De Moranda and others v. Dunkin and others, 4 Term Rep. 119.

nor

nor if the ſheriff has been out of office ſix months before the rule iſſues *, *i. e.* lunar months, and including the day he went out of office †, even though he has been requeſted within the ſix months, for he cannot be legally called on otherwiſe than by this rule ‡; and if the plaintiff ſhould notwithſtanding iſſue the rule, and obtain an attachment for not complying with it, the court will ſet ſuch proceedings aſide for irregularity, with coſts. So it ſeems if the parties compromiſe the matter, and afterwards rule the ſheriff to return the writ, the court will diſcharge the rule, and that with coſts §.

* 20th Geo. II. c. 37. ſ. 2.
† The King v. Adderley, Doug. 446.
‡ The King v. Jones, 2 Term Rep. 1.
§ Alchin v. Wells, 5 Term Rep. 470.

To bring in the body.

(1) Or "late."

P. } IT is ordered, that the (1) *ſheriffs of*
D. } *London* ſhall, within *four* days next after notice of this rule to be given to *their ſecondaries*, peremptorily bring into court the body of the *defendant*.

Side bar.

WHEN the rule to return the writ is expired *, and the ſheriff has returned a cepi corpus to the writ (for which return a ſearch ſhould previouſly be made on the file of writs of the term the writ is returnable, kept by the cuſtos brevium in the treaſury-chamber at Weſtminſter hall;) and if bail ſhould have been put in, an exception againſt them having been entered in the judge's or filazer's book, and notice thereof ſerved; this rule may be had to compel the ſheriff to bring in the body, although he may be out of office before the rule iſſues †, if it iſſue within ſix lunar months after he went out of office ‡.

* Hutchins v. Hird, 5 Term Rep. 479.

† Order T. T. 1791.

‡ See the King v. Adderley, Doug. 446.

UPON

For an attachment for not bringing in the body.

(1) The rule to bring in the body.

(2) Of the facts.

P. } UPON reading the rule made in this
D. } cauſe, on *Monday*, [*&c.*] (1) and the affidavit of *A. B.* (2); It is ordered, that a writ of attachment iſſue againſt the *ſheriffs of London*, for *their* contempt, in not bringing into court the *body* of the *defendant*, purſuant to the ſaid rule—upon the motion of Mr. *Giles*.

WHEN the time for putting in and perfecting the bail, and the rule to bring in the body, are expired, and the bail have not juſtified, or the rule allowing them has not been ſerved (for the ſheriff is not diſcharged till the rule is ſerved, though the plaintiff oppoſe the juſtification of the bail, who are allowed*, nor even if the defendant be dead, if he died after the expiration of the rule †) it is a motion of courſe for this rule, on a ſhort affidavit of the facts; and ſo it is for a ſimilar one

* The King v. the Sheriff of Middleſex, in the cauſe of Metcalffe v. Aylett, 4 Term Rep. 493.

† Same v. ſame, in the cauſe of Robins v. Hall, 3 Term Rep. 133.

for

for not returning the writ, if the ſheriff does not return it agreeable to the rule, when the time for putting in and perfecting the bail is expired; and this is one of the rules that may be moved for on the laſt day of the term *.

The affidavit ought to ſtate that the party called on by the rule was ſerved with a copy of it *perſonally*, and that the original was ſhewn to him at the ſame time †; and the affidavit ſhould not be ſworn before the plaintiff's attorney or agent, for if it is the court will not receive it ‡; and it muſt be intitled with the names of the parties in the cauſe, for affidavits and motions for attachments in civil ſuits are proceedings on the civil ſide of the court until the attachments iſſue: but as ſoon as the attachments iſſue the proceedings are on the crown ſide, and from that time the king muſt be named as the proſecutor §; therefore the rule for the attachment is drawn up by the clerk of the rules on the civil ſide, but the ſubſequent proceedings are tranſacted in the crown-office.

* 1 Burr. 651.
† The King v. Smithies, 3 Term Rep. 351.
‡ The King v. Wallace, ibid. 403.
§ Wood v. Webb, ibid. 253.

When the rule is drawn up, the plaintiff's attorney ſhould take it to his clerk in court in the crown-office, who will immediately thereon make out the attachment, which, if the rule be againſt the late ſheriff, is directed to the preſent one, but if it be againſt the preſent ſheriff, the attachment is directed to the coroner; and it ſhould then be lodged at the office of the preſent ſheriff or coroner to whom the writ is directed, with the bill of the debt, *i. e.* the ſum ſworn to and coſts *, including the coſts of the attachment, with the ſheriff or coroner's fee for executing it, as well as the coſts in the original action: for the writ iſſues with coſts, and is always ſo indorſed, and upon which, if there be no real defence to the action, the preſent ſheriff or coroner, as the caſe may be, uſually pays the money to the plaintiff's attorney on the return of the writ.

But if the defendant in the action has *merits*, and the bail juſtify before the money is paid, the court will, on a ſhort affidavit of the facts, ſtay the proceedings againſt the ſheriff on terms, and let in the defendant to try the action, if his attorney or agent ſwear in the affi-

* Stackey v. Peel, Tidd's Pr. 166.

davit

davit "That he believes the defendant has real "merits, and a good defence to the action."

The terms, if the plaintiff has not loſt a trial, *i. e.* the opportunity of trying his cauſe when he might have tried it had there been no default in putting in and perfecting the bail, are payment of the coſts*; but if the plaintiff has loſt a trial, then the attachment remains as a ſecurity to the plaintiff for what he may recover†, not exceeding the ſum ſworn to, inaſmuch as the bail are not liable to more§; though if there ſhould not be a defence to the action, yet the ſheriff may, before the money is paid over to the plaintiff, apply to the court, on an affidavit of equitable circumſtances, who it ſeems may thereon relieve him from part of the debt ſworn to, by proportioning the fine to the actual damages‖.

* Hill v. Bolt, 4 Term Rep. 352.
† Gravett v. Williams, cited in Hill v. Bolt.
§ Stackey v. Peel. Tidd's Pr. 166.
‖ The King v. Adderley, Doug. 446.

Allowing bail.

P. } UPON reading the affidavit of *A. B.*
D. } it is ordered, that the bail put in for the *defendant*, who have this day juſtified themſelves in court, be allowed, and the bail-piece filed—upon the motion of Mr. *Baldwin*.

THE motion to juſtify the bail is of courſe on an affidavit of the ſervice of the notice of juſtification, and on the bail's ſwearing, "That "they are houſekeepers, and are worth double "the ſum ſworn to after payment of all their "debts;" and they will thereupon be *allowed*, unleſs, upon an oppoſition to them by counſel before they do juſtify, either one or both ſhould be *rejected* by the court, on account of any irregularity in the notice, or for any of the cauſes which render them objectionable, moſt of which are particularized in the books of practice *; and as ſoon as the bail have juſtified, the rule allowing them, which is drawn up thereon to the above

* Sellon, 169; and Tidd, 139.

effect,

effect, ſhould be got from the clerk of the rules' office, and *ſerved* without delay; as until it is ſerved the ſheriff is not diſcharged, and of courſe an attachment may iſſue againſt him on the expiration of the rule to bring in the body, and the time allowed for putting in and perfecting the bail *.

* The King v. the Sheriff of Middleſex, in the cauſe of Metcalfe v. Aylett, 4 Term Rep. 493.

For time to declare.

P. } IT is ordered, that the *plaintiff* have
D. } time to declare until the firſt day, inclusive, of the next term, if the *defendant is* not in cuſtody.

Side bar.

For further time to declare.

P. } IT is ordered, that the *plaintiff* have
D. } further time to declare, until the laſt day, inclusive, of this term, if the *defendant is* not in cuſtody.

Side bar.

For the plaintiff peremptorily to declare.

(1) The laſt rule.

P. } UPON reading the rule made in this
D. } cauſe, on *Tueſday*, [*&c.*] (1) it is ordered, that the *plaintiff*, upon notice of this rule to be given to *his* attorney, ſhall peremptorily declare in this cauſe, on or before the laſt day of this term; otherwiſe let a nonproſs be entered—upon the motion of Mr. *Conſt.*

IF the defendant be in cuſtody, the plaintiff muſt declare againſt him before the end of the ſecond term *, *i. e.* the term next after

* Order T. T. 1716; and Ruſſell v. Stewart, 3 Burr. 1787.

the

the return of the writ; but if he is not, and the plaintiff ſhould not be ready to declare in the courſe of that time, in order to prevent the defendant from ſigning a nonproſs, which he otherwiſe may for want of a declaration *, ſuppoſing he appears the term the writ is returnable †, the rule for time to declare may be taken out of courſe; and if the defendant has appeared, a copy of it ſhould be ſerved ‡ on his attorney before the expiration of the time to declare; but if he has not, then the copy ſhould be ſtuck up on the board fixed up for that purpoſe againſt the outſide of the maſter's room in the King's Bench Office. But if the defendant does not ſign the nonproſs, the plaintiff is at liberty to declare, without the aid of this rule, at any time within a year from the return of the writ §.

If the plaintiff ſhould not be prepared to declare within the time allowed by the firſt rule, the above rule for *further time* may alſo be taken out of courſe; but which ſhould be

* 13 Cha. II. ſt. 2. c. 2. ſec. 3.

† Ibid. and Holmes v. White, Tidd's Pr. 236.

‡ Jans qui tam v. Hutton, 1 Sir W. Black. 290.

§ Worley v. Lee, 2 Term Rep. 112; and Penny v. Harvey, 3 Term Rep. 123.

taken out, and the copy ſerved or ſtuck up in the office, within the time allowed by the former rule, and which may be renewed in like manner of courſe, from time to time, *i. e.* from the commencement to the end of one term, and from the end of that term to the commencement of the next, and ſo on, as often as there may be occaſion, unleſs the defendant ſhould chuſe to make the rule peremptory, which he may do on receipt of the *ſecond rule.*

And if the defendant ſhould be inclined to compel the plaintiff either to declare or drop the action, on the receipt of the copy of the ſecond or any ſubſequent rule for time to declare, he may move to make the laſt rule *peremptory*, which is a motion of courſe, without any affidavit in ſupport of it, annexing an office copy of the laſt rule (which ſhould be previouſly got from the clerk of the rules' office) to the inſtructions to counſel to move: and thereupon the above rule is drawn up, which ſhould of courſe be ſerved; and then, if the plaintiff do not declare within the time ſpecified in the rule, the defendant is at liberty to ſign a nonproſs for want of a declaration.

IT

P. } IT is ordered, that upon payment of costs, to be taxed by the master, the action be discontinued. To discontinue on payment of costs.

D. }

Side bar.

I appoint 7th *Dec.* at *eleven* o'clock. *E. Benton.* For costs, 2*l.* 14*s.* *E. Benton.* Appointment and allocatur.

P. } IT is ordered, that upon payment of costs, to be taxed by the master, the action be discontinued, as to the *defendant D.* The like as to one defendant.

D. and another. }

Side bar.

IF, at the expiration of the time allowed for declaring, the plaintiff should find it advisable not to proceed further in the action, he may either suffer a nonpros to be signed, or (which is most prudent) his attorney may take out this rule to *discontinue* the action, which, in common cases, is conditional, being on payment of costs; but, in particular cases, leave may be obtained to discontinue without payment

payment of coſts; as, where it appeared an adminiſtrator had *not* knowingly brought the action wrong, the court gave him leave to diſcontinue without payment of coſts, on his conſenting not to bring a new action without leave of the court *; though where it appeared an executor *had* knowingly brought his action wrong, the court refuſed him ſuch leave †.

As the plaintiff is at liberty to diſcontinue the action againſt all the defendants, where there are ſeveral, ſo he may againſt *either* of them, and take out the above rule for that purpoſe; and the rule to diſcontinue may, in general, be regularly taken out by the plaintiff, if he ſhould not think fit to proceed further in any of the early ſtages of the cauſe, but not after the action has been decided ‡; and if improperly obtained, it will be diſcharged on motion §.

When the rule to diſcontinue on payment of coſts is obtained, it ſhould be taken to the

* Bennet, adminiſtrator, v. Coker, 4 Burr. 1927.

† Harris, executor, v. Jones, 3 Burr. 1451; and 1 Sir W. Black. 451. S. C.

‡ And ſee Tidd's Pr. 421.

§ Symonds v. Parmenter and Barrow, 1 Wil. 86; and Belcher v. Ganſell, 4 Burr. 2502.

maſter's

maſter's office, for his appointment to tax the coſts; which his clerk will give at the foot of the rule, as above; a copy of it ſhould then be ſerved at the defendant's attorney's, and the appointment attended, when the maſter will tax the coſts (as the firſt appointment muſt be now attended *) and give his allocatur of the ſame to the above effect: and as the rule is conditional, the taxed coſts ſhould then be immediately paid; for in default of it the defendant is at liberty to proceed on as if no rule had been taken out.

* Order H. T. 3ad Geo. III.

UPON

To change the venue.

(1) Of the facts.

P. } UPON reading the affidavit of the
D. } *defendant*, (1) it is ordered, that the action be laid in the county of *Surrey*—upon the motion of Mr. *Baldwin*.

IF, in the tranſitory actions where the court permit the venue to be changed of courſe, which may be found collected in the books of practice *, the plaintiff does not lay the venue in the county or city where the cauſe of action aroſe, and the defendant is inclined to remove it thither, this rule may be obtained for that purpoſe, on an affidavit † "That the cauſe of action (if any) aroſe *wholly* "in the county or city to which the venue is "applied to be changed, and not elſewhere out "of ſuch county or city ‡;" but not, it ſeems, if the cauſe of action aroſe in a city or county where the juſtices of aſſize do not regularly go every circuit §: though, if it appear to the

* Sellon, 261. Tidd, 354; and Impey, 165. 3d ed.

† Orders M. T. 1654. ſ. 5.

‡ Waddington v. Thellwell, eſq; 4 Burr. 2450; Watkins v. Towers and others, 2 Term Rep. 275; and Allen v. Griffiths, 3 Term Rep. 495.

§ Sellon, 272; and Tidd, 362.

court

court that there cannot be a fair and ſatisfactory trial in the county or city to which the venue is changed, they will diſcharge the rule to change the venue *.

And, in particular caſes, where it is not of courſe to change the venue, if there is a probable ground to apprehend a fair, impartial, or ſatisfactory trial cannot be had where the venue is laid, the court will, on an affidavit of the circumſtances, grant a rule niſi, and afterwards either on an affidavit of the ſervice, or on ſhewing cauſe, if it is oppoſed, make it abſolute, to change the venue †. So if it appear that both the plaintiff's and defendant's witneſſes live in the county or city to which the venue is moved to be changed ‡; and if it plainly appear to the court that the matter cannot be fairly and impartially tried in the proper county, they will give leave to enter a ſuggeſtion of the facts on the roll, and

* Petyt v. Berkeley, eſq; Cowp. 510.

† The Mayor of Poole v. Bennet, 2 Stra. 874; Mylock v. Saladine, 3 Burr. 1564; and 1 Sir W. Black. 480. S. C.

‡ Foſter v. Taylor, 1 Term Rep. 781.

award

award the venire to the next or another county *.

The motion to change the venue, however, cannot be made before the defendant has appeared; for, until appearance, the defendant is not in a ſituation to make any application †; and it ſhould be made before plea ‡, though it may be made after an order for time to plead ‖; but not if it be to take ſhort notice of trial for the firſt ſittings in London or Middleſex, becauſe there a trial would be loſt §.

* Rex v. Harris et al, 3 Burr. 1330; and 3 Black. Com. 294. 7th ed.

† Smith v. Shepherd, 5 Term Rep. 9.

‡ Orders M. T. 1654. ſ. 5.

‖ Ford v. Gainer, Sayer, 207.

§ Petyt v. Berkeley, eſq; Cowp. 510.

To bring back the venue.

P. } UPON reading the rule made in this
D. } cauſe, on *Friday*, [*&c.*] (1) and upon the undertaking of the *plaintiff* to give material evidence on the trial of this cauſe, of ſome matter in iſſue ariſing in the *city of London*, where the cauſe of action was firſt laid; It is ordered, that the ſaid rule be diſcharged —upon the motion of Mr. *Marryat*.

(1) The rule to change the venue.

IT often happens that the venue in tranſitory actions is not laid where the cauſe of action really aroſe; and then in ſuch of them as the venue is permitted to be changed in, of courſe the defendant will frequently obtain the preceding rule to change the ſame; upon which it is uſual for the plaintiff to move to bring the venue back, on an *undertaking* to give material evidence on the trial, of ſome matter ariſing where the venue was firſt laid, and upon which this rule is made.

But it does not ſeem prudent for the plaintiff to enter into this undertaking, unleſs he has ſome material evidence to give in ſupport of it; for if he has not, he muſt be

nonſuited on the trial *; but proving a rule of court in Middleſex, for the defendant to pay money into court, has been held a ſufficient compliance with an undertaking to give material evidence in Middleſex, becauſe it is an admiſſion of the cauſe of action †. And it ſeems that in an action againſt a ſheriff for a falſe return, proof of the delivery of the writ to the defendant, and of his returning it in the county where the venue was laid, is ſufficient to ſupport an undertaking to give material evidence in that county ‡.

The motion for this rule is, of courſe, on the above undertaking, without any affidavit whatever; and the rule may be obtained in almoſt any ſtage of the cauſe, even after it has been down to trial, and the plaintiff nonſuited, and the nonſuit ſet aſide; and though the cauſe has been down a ſecond time thereon, and then made a remanet for want of jurors §.

* Bruckſhaw v. Hopkins, Cowp. 409.
† Watkins v. Towers and others, 2 Term Rep. 275.
‡ Griffith v. Walker, Sayer, 54.
§ Bruckſhaw v. Hopkins, ut ſup.

P. D.
Same C.
Same E.
Same F.

IT is ordered, that the *plaintiff*, upon notice of this rule to be given to *his* attorney, ſhall, upon *the morrow*, ſhew cauſe why, upon the ſubmiſſion of the defendants *C. E.* and *F.* to be bound and concluded in the actions brought againſt them by the fate of ſuch verdict as ſhall be found againſt the *defendant D.* or ſuch other action as the ſaid *plaintiff* ſhall chuſe to try, all further proceedings in the ſaid *three* other actions ſhould not be ſtayed, until this court ſhall otherwiſe order; and if a verdict ſhall be given in favour of the *plaintiff* in ſuch action as ſhall be tried, to the ſatisfaction of the Lord Chief Juſtice, or other Judge before whom the ſaid cauſe ſhall be tried, that then no writ of error ſhall be brought upon the judgement to be entered up, on the ſaid verdict; nor ſhall any bill in equity be filed for relief againſt the ſame; and that in the mean time further proceedings in theſe cauſes be ſtayed—upon the motion of Mr. *Park*.

Niſi to conſolidate.

Abſolute thereon.
(1) The rule niſi.
(2) Of the ſervice of the rule niſi.

P. D.
Same C.
Same E.
Same F.

UPON reading the rule made in theſe cauſes, on *Friday*, [*&c.*] in this term (1), the affidavit of *G. H.* (2) and no cauſe being ſhewn to the contrary; It is ordered, upon the ſubmiſſion of the defendants *C. E.* and *F.* to be bound and concluded in the actions brought againſt them by the fate of ſuch verdict as ſhall be found againſt the *defendant D.* or ſuch other action as the *plaintiff* ſhall chuſe to try, that all further proceedings in the ſaid *three* other actions be ſtayed, until this court ſhall otherwiſe order; and if a verdict ſhall be given in favour of the *plaintiff* in ſuch action as ſhall be tried, to the ſatisfaction of the Lord Chief Juſtice, or other Judge before whom the ſaid cauſe ſhall be tried, that then no writ of error ſhall be brought upon the judgement to be entered up, on ſuch verdict; nor ſhall any bill in equity be filed, for relief againſt the ſame—upon the motion of Mr. *Park.*

FORMERLY, if the underwriters refuſed payment of a loſs claimed by the inſured,

ſured, under a policy of inſurance, it was uſual for the latter to bring a ſeparate action againſt *each* of the former, and to proceed to trial in *all* the actions *; though now the defendants, after they have appeared (but not before, as until appearance they are not in a ſituation to make any application, as we have already obſerved †) may apply to the court for the above rule niſi to *conſolidate* the actions; the motion for which is of courſe without any affidavit in ſupport of the application, and it will afterwards be made abſolute on the terms ſtated in the rule, whether cauſe be ſhewn or not; and if no cauſe be ſhewn, the above abſolute rule is drawn up thereon: but it ſeems it may be made part of the rule, that the defendants ſhall produce all *books* and *papers* material to the point in iſſue ‡.

And it may be obſerved, that the conſent of the defendants in the action conſolidated, to be bound by the verdict in the action to be tried, means a verdict to the ſatisfaction of the

* Park on Inſurances, introd. 44. 2d ed.

† See p. 30, ante.

‡ Park on Inſurances, introd. 45. 2d ed.

court *, or, in other words, ſuch a one as the court ſhall think ought to ſtand as a *final* determination of the matter †. And if two actions of the ſame nature are brought by the plaintiff at the ſame time, the court will, on motion, after a rule to ſhew cauſe, direct them to be conſolidated, and the plaintiff to pay the coſts of the application ‡: indeed the plaintiff, in ſuch a caſe, ſeems liable to an action upon the caſe for ſplitting his cauſe of action §.

* Loft, 147.

† Hodſon v. Richardſon, 3 Burr. 1477.

‡ Cecil v. Brigges, bart.; and ſame v. ſame, 2 Term Rep. 639.

§ 3 Morgan's Vade Mecum, 400.

UPON

P. } UPON reading the *affidavit of A. B. gentleman, and another, and the affidavit*
D. } *of the defendant*, (1) It is ordered, that the *plaintiff*, upon notice of this rule to be given to *him or his agent*, (2) ſhall, upon *Tueſday*, [*&c.*] ſhew cauſe why the judgement ſigned in this cauſe, and the writ of *fieri facias* iſſued and executed thereon, ſhould not be ſet aſide, with coſts, for irregularity; and why the money levied on the goods and chattels of the ſaid *defendant* by the *ſheriff of the county of Devon*, by virtue of the ſaid writ, ſhould not be reſtored to the ſaid *defendant*; and that in the mean time the money ſhall remain in the hands of the ſaid *ſheriff*—upon the motion of Mr. *Mingay*.

Niſi to ſet aſide a judgement, and execution levied thereon, with coſts, for irregularity.

(1) The affidavits of the facts.

(2) Being an attorney.

P. } UPON reading the rule made in this
D. } cauſe, on *Monday*, [*&c.*] (1), *the affidavit of the plaintiff and another*, *the affidavit of C. E. and another*, (2) and upon hearing counſel for both parties; It is ordered, that the judgement ſigned in this cauſe, and the writ of *fieri facias* iſſued and executed thereon, be ſet aſide,

Abſolute thereon.

(1) The rule niſi.

(2) The affidavits on the part of the plaintiff, as to the facts.

with costs, for irregularity; and that the money levied on the goods and chattels of the said *defendant*, by the *sheriff of the county of Devon*, by virtue of the said writ, be restored to the said *defendant*. And it is referred to the master to tax the said *defendant his* said costs, together with the costs of this application; which costs, when taxed, shall be paid by the *plaintiff* to the said *defendant*, or *his* attorney—upon the motion of Mr. *Erskine* for the *plaintiff*, and Mr. *Mingay* for the *defendant*.

Appointment and allocatur.

I appoint 23*d Jan.* at *six* o'clock.
E. Benton.

For costs, 16 *l.* 10*s.*
E. Benton.

IF any *irregularity* occurs in the course of the proceedings in a cause, the opposite party may, on a short affidavit of the facts, apply for and obtain a rule nisi of the above nature, to set the proceedings aside for such irregularity, and commonly with costs; for it is a general rule, that when proceedings are set aside for irregularity,

larity, it is *with coſts*; to which there ſeems to be but one exception, and that is, where the point in queſtion has never been *ſettled* before *. And the rule niſi will afterwards, on an affidavit of the ſervice, if it is not oppoſed, or on hearing both parties if it is, be made abſolute, when the rule thereon will be drawn up after the above manner.

Upon which, if the rule niſi be made abſolute (as here, it being a clear irregularity, as may be ſeen by the caſe which we have already mentioned †) with coſts, the appointment to tax them ſhould be got from the maſter's clerk, at the foot of the rule, as above ‡, and ſerved, and attended with a bill of the coſts, which the maſter will then *tax*, whether the adverſe party's attorney attends or not, the firſt appointment being now to be attended §, and give his allocatur for the ſame to the above effect; and then, if they are not paid on demand, the party will ſubject himſelf to an *attachment* for the non-payment of

* The King v. Jones, 2 Term Rep. 1.
† Woolcombe v. Froſt, p. 6, ante.
‡ See p. 26, ante.
§ See p. 27, ante.

them *. And it may be obſerved, that if an execution has been iſſued and levied under an *irregular* judgement, as here, when the rule is made abſolute for ſetting the proceedings aſide, the party prevailing may, for the injury he may thereby have ſuſtained, bring an action of treſpaſs againſt his *adverſary* †, as well as the *attorney* ‡.

And as to the time of applying to ſet aſide the proceedings, it ſeems, that if the irregularity be in the omiſſion of the name in the writ, the proceedings may be ſet aſide at any time §. So if the affidavit of the ſervice of the writ be defective ‖. But the general rule is, that the party muſt apply *without delay* ¶, *i. e.* as ſoon as he has an opportunity ⸸; for an irregularity muſt be taken advantage of in its proper ſeaſon, otherwiſe no advantage can be taken of it after-

* And ſee Tidd's Pr. 266.

† Phillips v. Biron et al. 1 Stra. 509.

‡ Barker, widow, v. Braham and Norwood, 3 Wil. 368, 4th ed.

§ Tomſon v. Browne, And. 16.

‖ Lakin v. Dewall, Sellon's Pr. in notes, 105.

¶ Petre v. White, 3 Term Rep. 5.

⸸ Smith v. Painter, 2 Term Rep. 719,

wards,

wards *, and therefore it ſhould be the *firſt* opportunity; though it ſeems the party may wait till his adverſary ſhews he means to make uſe of the irregularity †. But if he goes on as if no irregularity had happened, the proceedings will not afterwards be ſet aſide ‡, for he thereby *waives* the irregularity.

* The King v. Franklin, cited in the King v. Perry and two others. 5 Term Rep. 453.

† Loft, 333.

‡ Ibid. 236.

UPON

To ſet aſide a regular interlocutary judgement, and ſubſequent proceedings thereon, upon payment of coſts.
(1) The defendant's attorney's affidavit of the facts.

P. } UPON reading the affidavit of *A. B*, *D.* } *gentleman*, (1) It is ordered, that the *plaintiff*, upon notice of this rule to be given to *his* attorney, ſhall, upon *the morrow*, ſhew cauſe why the interlocutory judgement ſigned in this cauſe, and the ſubſequent proceedings had thereon, ſhould not be ſet aſide, upon payment of coſts, and that in the mean time proceedings be ſtayed—upon the motion of Mr. *Dampier*.

Abſolute thereon.
(1) The rule niſi.
(2) The plaintiff's attorney's affidavit of the facts.

P. } UPON reading the rule made in this *D.* } cauſe, *on Tueſday*, [*&c.*] (1) *the affidavit of C. E. gentleman*, (2) and upon hearing Mr. *Lens* of counſel for the *plaintiff*, and Mr. *Dampier* of counſel for the *defendant*; It is ordered, upon payment of coſts, to be taxed by the maſter, that the interlocutory judgement ſigned in this cauſe, and the ſubſequent proceedings had thereon, be ſet aſide.

Appointment and allocatur.

I appoint 13 *Feb.* *eleven* o'clock.
E. Benton.

For coſts, 4*l.* 15*s.* 8*d.*
E. Benton.

IN ſome caſes *regular* proceedings may be ſet aſide, as here, where the defendant would otherwiſe be deprived of the opportunity of making his defence to the action; but it is always upon the terms of putting the plaintiff in as good a condition *as he was before* *; for if that cannot be done, the court will not take an advantage from him which he has regularly obtained; conſequently the defendant muſt apply in the *firſt* inſtance, and before the plaintiff has loſt a trial.

Therefore, where the defendant has a defence which he means to try the merits of, though by ſome accident he lets the plaintiff ſign judgement for want of a plea, but applies to ſet it aſide as early as he receives notice of ſuch proceeding, the court will let him in to try the *merits* †, upon his paying the coſts, and will grant the above rule niſi thereon.

The application for it, however, muſt be grounded on an affidavit of his attorney or

* Fox v. Glaſs, 2 Stra. 823.

† Ibid. and Forbes v. Lord Middleton, ibid. 1242; and Rex v. Peters et al. or Cavil v. Burnaford, et al. 1 Burr. 568.

agent,

agent, ſhortly ſtating the proceedings, and that the defendant has merits; but the particular merits need not be ſtated, as the deponent's ſwearing generally, which he muſt do, "That he "believes the defendant has real merits, and a "good defence to the action," will be ſufficient.

And the court will afterwards, on an affidavit of ſervice of the rule niſi, if it is not oppoſed, or on hearing the plaintiff, if he oppoſes it by ſhewing cauſe, make it abſolute, and the above rule will be drawn up thereon. But the rule being conditional, *i. e. on payment of coſts*, it muſt be drawn up immediately, and the above appointment got thereon from the maſter's clerk *, to tax the coſts; when the maſter will tax the ſame on the firſt appointment now †, and give his allocatur for them as above, and they muſt *then* be paid; for otherwiſe the plaintiff may proceed on upon his judgement, and the defendant will loſe the benefit of the rule.

* See p. 26, ante. † See p. 27, ante.

IT

P. } IT is ordered, that the *defendant*, upon notice of this rule to be given to *him*, or *his* attorney, ſhall peremptorily, on *the morrow*, ſhew cauſe why it ſhould not be referred to the maſter, to ſee what is due for principal and intereſt on the *note of hand* (1) for which this action is brought; and alſo to tax the *plaintiff his* coſts: and why the ſaid *plaintiff* ſhould not be at liberty to ſign final judgement thereon, without executing a writ of inquiry of damages—upon the motion of Mr. *Bayley*.

Niſi to refer it to the maſter to calculate the principal and intereſt on a note of hand, and for the plaintiff to be at liberty to ſign final judgement thereon without executing a writ of inquiry of damages.

(1) Or "bill of exchange."

P. } UPON reading the rule made in this cauſe, *yeſterday*, (1) the affidavit of *A. B.* (2) and no cauſe being ſhewn to the contrary; It is ordered, that it be referred to the maſter, to ſee what is due for principal and intereſt on the *note of hand* for which this action is brought; and alſo to tax the *plaintiff his* coſts: and that the ſaid *plaintiff* be at liberty to ſign final judgement thereon, without executing a writ of inquiry of damages—upon the motion of Mr. *Bayley*.

Abſolute thereon.

(1) The rule niſi.

(2) Of the ſervice of the rule niſi.

I appoint 27th *June*, *twelve* o'clock. *R. Forſter.*

Appointment.

WHEN

WHEN the plaintiff has obtained an interlocutory judgement, in actions of aſſumpſit on *bills of exchange* or *promiſſory notes*, the court will refer it to the maſter, to ſee what is due for principal and intereſt, and give the plaintiff leave to ſign the final judgement thereon *without* executing a writ of inquiry *; which may frequently ſave the plaintiff *a term*, where the defendant's object is delay: and it is now a motion of courſe for the above rule niſi, without any affidavit of the facts, and which will afterwards be made abſolute on an affidavit of ſervice, and the above rule abſolute will be then drawn up thereon.

Theſe rules, diſpenſing with the writ of inquiry, having introduced a *new practice* in this ſtage of theſe actions, it may not be uſeleſs to obſerve, that the mode of proceeding on the rule abſolute is for the plaintiff's attorney to get an *appointment* at the foot of the rule from the maſter's clerk †, which he will give in the uſual way, after the above manner, and then to ſerve it, and attend the ſame, with the notes or bills on which the action is

* Shepherd v. Charter, 4 Term Rep. 275.

† See p. 26, ante.

brought,

brought, and a calculation of the intereſt, and alſo an incipitur of the final judgement, on a *double half-crown* ſtamp *, being the final judgement paper; and the maſter will then, whether the defendant's attorney attends or not, as the firſt appointment is now to be attended †, *tax* the coſts, and *ſign* the final judgement, by giving his *allocatur* thereon in this manner:

	£.	s.	d.
For principal and intereſt -	101	1	7
For coſts - - - -	19	18	5
	£. 121	—	—

R. Forſter,
27th *June* 1795.

* 5 Will. III. c. 21. 2*s.* 6*d.*; and 9 and 10 Will. III. c. 25. 2*s.* 6*d.*

† See p. 27, ante.

IT

To pay money into court.

P. } IT is ordered, that the *defendant* have
D. } leave to bring into court *twenty pounds*; and thereupon, unleſs the *plaintiff* ſhall accept thereof, with coſts, to be taxed by the maſter, in full diſcharge of this ſuit, the ſaid *twenty pounds* ſhall be ſtruck out of the declaration, and paid out of court, to the *plaintiff*, or *his* attorney; and upon the trial of the iſſue the *plaintiff* ſhall not be permitted to give evidence for the ſaid *twenty pounds*—upon the motion of Mr. *Shepherd*.

Appointment and allocatur.

I appoint 10 *June*, *ſix* o'clock.
R. Forſter.

For coſts, 6*l.* 3*s.* 6*d.*
R. Forſter.

IF, in the actions wherein the defendant *may* pay money into court, which may be ſeen in the books of practice *, the diſpute is not whether any thing, but *how much*, is due to the plaintiff, this rule may be had to enable the defendant to offer the plaintiff, by paying it into court, ſuch ſum as he *acknowledges* to be *due* to him, in full diſcharge of the action; and the rule may be obtained at any time after appearance (but not before, as until then the defendant is not in a ſituation to make any

* Sellon, 308. Tidd, 408; and Impey 185, 3d ed.

application;

application * ;) and before plea, and even after; on obtaining a judge's order for that purpoſe, † which is made on payment of coſts.

The motion for the rule is of courſe, without any affidavit in ſupport of it ‡: but before it can be drawn up, the money muſt be paid to the ſigner of the writs, who is the officer that now receives it; and his receipt for the money muſt be taken to the clerk of the rules, with the ſignature of counſel to the inſtructions to move for leave to pay it in, for (like moſt of the other *common* rules, the motions for which are of courſe in the *firſt* inſtance) it need not be moved; and thereupon the rule is drawn up.

The general rule, as to paying money into court, is, that when the demand is for a ſum certain, or capable of being aſcertained by mere computation, *without* leaving any ſort of diſcretion to the jury, the court will permit the money to be paid in, even upon particular counts: but it ſeems the court will thereon compel the defendant to conſent to ſuch terms being made part of the rule, as the juſtice of

* See p. 30, ante.

† Griffiths v. Williams, 1 Term Rep. 710.

‡ And ſee 3 Black. Com. 304, 7th ed.; and King, qui tam, v. Cliſton, 5 Term Rep. 257.

the caſe may require, as an inſpection of *books* and *papers*, &c.*

And in order to ſee what in particular the plaintiff claims, where it does not appear by the declaration, and be thereby enabled to know whether it can be ſo aſcertained or not, the defendant's attorney may, upon a ſummons, obtain a judge's order "for the plaintiff's attorney to deliver him the *particulars* in writing of the plaintiff's demand, for which the action is brought, and to ſtay the proceedings in the mean time:" indeed it has been ſaid, that in *all* caſes the plaintiff ought to give the defendant an account of the particulars of his demand†. But in practice this is eſteemed to mean *only* where the particulars do not ſufficiently appear on the face of the declaration, as in actions for goods ſold and delivered, &c.

It has been held that the rule is an admiſſion of the cauſe of action ſtated in the declaration‡, and that the plaintiff is entitled to maintain the action *to the amount of the ſum*

* Hallett, eſq. and others v. the Eaſt India Company, 2 Burr. 1120; and ſee Hutton and wife v. Bolton, cited in Clay v. Willan and others, 1 Com. Pleas, Term Rep. 298.

† Le Breton v. Braham, 3 Burr. 1389.

‡ Watkins v. Towers and others, 2 Term Rep. 275.

paid

paid in; but that it admits nothing more, and therefore does not preclude the defendant from taking any objection to the action beyond that ſum, even though, unleſs ſuch ſum were paid in, the objection would be a bar to the whole demand *.

And ſhould the defendant obtain the rule, and under it pay money into court, in an action where the court do *not* permit money to be paid in, the rule may, on motion, after a rule to ſhew cauſe, be *diſcharged* for irregularity; but taking the money out of court is a *waiver* of the irregularity, and the plaintiff cannot afterwards have a verdict, unleſs he recover more than the ſum paid in †.

If, on the money's being paid into court, the plaintiff chooſe to accept it in full diſcharge of the action, he is entitled to his *whole* coſts up to that time, except the money be paid in on particular counts, for then he is only entitled to the coſts of *ſuch* counts ‡; but if he proceeds after the money is paid in, and then before trial accepts it, which he may do §, he muſt

* Cox and another, executors of Shultz, v. Parry, 1 Term Rep. 464.

† Griffiths v. Williams, ibid. 710.

‡ Baillie v. Cazelet, 4 Term Rep. 579.

§ Kabell v. Hudſon, ibid. 10.

pay the defendant his coſts of the *ſubſequent* proceedings *.

When the plaintiff elects to take the money paid into court in full *diſcharge* of the action, his attorney muſt get an office copy of the defendant's rule to pay the money into court from the clerk of the rules, and take it to the ſigner of the writs, who will thereon give him a check on his banker for the money, on the attorney's ſigning a receipt for it in the book kept for that purpoſe; but he will not pay it to the attorney's clerk, or any other perſon than the *plaintiff* himſelf or his *attorney*, to whom the rule directs it to be paid.

The above appointment to tax the coſts ſhould then be got in the uſual way †, from the maſter's clerk, on the office copy of the rule, and ſerved at the defendant's attorney's ‡, which ſhould of courſe be attended by the plaintiff's attorney or his clerk, with a bill of the coſts, when the maſter will *tax* the ſame, on the firſt appointment ‖, and give his *allocatur* thereon as above; and if the defendant does not *then* pay them,

* Hartley and others v. Bateſon and others, 1 Term Rep. 629.

† See p. 26, ante.

‡ Kabell v. Hudſon, 4 Term Rep. 10.

‖ See p. 27, ante.

the

the plaintiff may proceed as if no money had been paid in, and go on to trial, and take a verdict, even though he does not make out his demand ſo much as the defendant has paid in *.

But if the plaintiff does not chooſe to accept the money in full diſcharge of the action, yet he may take it out, and proceed on for further damages, but that is at his *own peril*; for if he proceeds to trial, and does not prove *more* due than is paid into court, he muſt be nonſuited †, and pay the defendant *all* his coſts ‡: ſo he muſt if the defendant obtain a verdict §; and if a juror is withdrawn on the trial, he will not be entitled to *any* coſts, not even up to the time of paying the money in ‖.

However, in either of the caſes, the plaintiff has a right to all the money paid into court, and it will be paid him at any time (unleſs, indeed, where the defendant is intitled to any *ſubſequent* coſts ¶, and before the plaintiff receives the money, the court ſhould, upon the defendant's application, order it to be *ſet off* againſt his coſts, or direct them to be paid *out of*

* Hand v. Lady Dineley, 2 Stra. 1220.
† 3 Black. Com. 304, 7th ed.
‡ Kabell v. Hudſon, 4 Term Rep. 10.
§ Stevenſon v. Yorke, ibid.
‖ Stodhart v. Johnſon, 3 Term Rep. 657.
¶ See p. 51, ante.

*it**); for by paying the money in, the defendant has *acknowledged* it to be the plaintiff's due †, and he can never recover it back again, though it afterwards appear that he paid it wrongfully ‡.

But it ſeems the court will permit the money to be brought in *without* coſts, and very likely make the plaintiff pay all the coſts, if the action appears to be brought and kept on foot *oppreſſively*, as where the plaintiff kept out of the way to prevent a tender; and his attorney, on a judge's ſummons to ſtay the proceedings, on payment of the debt and coſts, pretended that the plaintiff had other demands §.

* See p. 89, poſt.

† 3 Black. Com. 304, 7th ed.

‡ Malcolm and another, aſſignees, &c. v. Fullarton, 2 Term Rep. 645.

§ Johnſon v. Houlditch, 1 Burr. 578.

P. } IT is ordered that the *defendant* have leave to plead ſeveral matters, to wit, that *he* did not undertake, and that *he* did not undertake at any time within ſix years next before the *exhibiting the bill* of the *plaintiff*— upon the motion of Mr. *Shepherd*.

For leave to plead ſeveral matters, viz. non-aſſumpſit, and non-aſſumpſit within ſix years.

AT common law the defendant could only plead a *ſingle* plea*, which rigour often abridged the juſtice of his defence; but to remedy this defect †, the legiſlature having provided that the defendant, with leave of the court, may plead *as many ſeveral matters* as he ſhall think neceſſary for his defence ‡, it is now a motion of courſe for this rule for that purpoſe, without any affidavit in ſupport of the application; as it is not uſual for the court, upon the motion, to go into the conſideration of the materiality of the pleas ‖.

And the rule may regularly be obtained in

* 3 Black. Com. 308, 7th ed.
† 2 Wynne's Eunomus, 141, 2d ed.
‡ 4 and 5 Anne, c. 16. ſ. 4.
‖ Crozier v. Storke, Sayer, 28.

all actions, except *qui tam* ones*, or where the matters intended to be pleaded are *inconſiſtent* with each other †, as not guilty, and juſtification ‡ or non-aſſumpſit to the whole, and a tender to part ‖, or non-eſt factum, and a tender to part, in an action on a bond §; and if the rule be obtained in any of theſe caſes, it will be *diſcharged* on motion, after a rule to ſhew cauſe; but the court will, at the ſame time, give the defendant leave to plead either of the pleas ¶; and before the plea is filed the rule ſhould be drawn up, and a copy of it annexed to the plea.

* Morgan v. Luckup, 2 Stra. 1044; Law, qui tam, v. Crowther, 2 Wil. 21; and Heyrick v. Foſter, 4 Term Rep. 701.

† Crozier v. Storke, Sayer, 28.

‡ Palmer v. Wadbrooke, 2 Stra. 876.

‖ Maclellan v. Howard, 4 Term Rep. 194.

§ Jenkins v. Edwards, 5 Term Rep. 97.

¶ Ibid.

P. } IT is ordered, that the *defendant*, upon notice of this rule to be given to *his* attorney, ſhall abide by *his* plea already pleaded, or plead ſuch other plea peremptorily on the morrow, as ſhall not be waived; otherwiſe let judgement be entered for the *plaintiff*—upon the motion of Mr. *Giles*.

For the defendant to abide by his plea.

IT frequently happens that a defendant, eſpecially in actions where he has no defence, in order to gain time, and by which he ſometimes gets over the term, will plead a *ſham* plea, as a judgement recovered, which is the common one, though now there are a few other's made uſe of for this purpoſe, and let the plaintiff proceed thereon, by replying thereto, and making up and delivering the paper-book; but when the time for returning it is expired, he will *waive* his plea, by ſtriking out the ſpecial pleadings, and returning the book with the general iſſue, or a demurrer to the replication.

To prevent which trick, the court will compel the defendant to plead ſuch plea as he will ſtand

ſtand by *; and it is now the practice to obtain this rule for that purpoſe as ſoon as the plea is filed, the motion for which is of courſe without any affidavit in ſupport of it; though, if the defendant does not, in conſequence of the rule, alter his plea already pleaded, the plea *ſtands*; and therefore the plaintiff ſhould not ſign judgement, but proceed to make up the paper-book †; and after this rule is obtained, the defendant can only plead the general iſſue ‡, and give a notice of ſet off §.

* Foſter v. Snow, 2 Burr. 781.
† Webb v. Holt, 2 Stra. 1234.
‡ Hare v. Lloyd, 1 Term Rep. 693.
§ Cockran v. Robertſon, in notes, ibid.

UPON

P. who, &c. } UPON hearing Mr. *Lambe*, *D.* } of counſel for the *plaintiff*, and Mr. *Conſt*, of counſel for the *defendant*, and by their conſent; It is ordered, upon payment of *forty ſhillings*, *being one penalty*, and the coſts of this ſuit, to be taxed by Mr. *Benton*, for the *offence* for which this action is brought, that all further proceedings therein be ſtayed —upon the motion of Mr. *Lambe*, for the *plaintiff*; and Mr. *Conſt*, for the *defendant*. To compound, in a qui tam action.

P. who, &c. } UPON hearing counſel for *D.* } both parties, and by their conſent, and the ſum of *five pounds* being paid into the hands of *James Templer*, *eſq*; maſter of the Crown Office, for the uſe of his Majeſty; It is ordered, that the *plaintiff* have leave to compound this action with the *defendant* for the ſum of *ten pounds*, with coſts of ſuit, to be taxed by Mr. *Benton*, in full ſatisfaction and diſcharge of the *offences* for which this action is brought—upon the motion of Mr. *Wigley*, for the *plaintiff*; and Mr. *Garrow*, for the *defendant*. The like.

UPON

The like.

P. who, &c. } UPON hearing counſel for
D. } both parties, and by their conſent, and the ſum of *ten pounds* being paid into the hands of *James Templer, eſq*; the maſter of the Crown Office, for the uſe of his Majeſty, being a moiety of the compoſition agreed to be accepted in full ſatisfaction and diſcharge of this ſuit; It is ordered, that the *plaintiff*, who ſues as well for our ſovereign lord the King as for himſelf, have leave to compound this action with the *defendant* for the ſum of *twenty pounds*, together with his coſts of ſuit, to be taxed by Mr. *Benton*, for the *offence* for which this action is brought; namely, for *delivering a falſe account, and omitting to deliver a ticket with horſes let to hire*, contrary to the *ſtatute* in that caſe made and provided—upon the motion of Mr. *Shepherd*, for the *plaintiff*; and Mr. *Baldwin*, for the *defendant*.

Appointment and allocatur.

I appoint *1ſt Feb.* *ſix* o'clock.
E. Benton.

For coſts, 8*l.* 1*s.* 1*d.*
E. Benton.

THE legiſlature having declared that no plaintiff, in a popular action, ſhall *compound* before anſwer, nor after without the order of the

the court *, the parties in ſuch an action cannot ſettle it until after plea, nor then without leave of the court; but ſuch leave may now generally be obtained in any ſubſequent ſtage of the proceedings, even after a verdict againſt the defendant †, *without* any affidavit of the facts, on the application of one party, and *conſent* of the other: and leave was ſo granted in the cauſe in which the firſt of the above rules was drawn up ‡, which was an action brought by a farmer of the duty againſt an innkeeper, for penalties under the poſt-horſe act §. And ſo it was in the 2d ‖ and 3d ¶, which were ſimilar actions, as well as in *ſeveral others* of the like nature, about the ſame time.

It may be obſerved by the above rules, that the rules for leave to compound are not always drawn up quite alike; for that ſometimes the nature of the offence for which the action is brought is inſerted in the rule, and at other times not, ſo ſometimes the *king's* moiety is

* 18th Eliz. c. 5. ſ. 3.

† Maughan, qui tam, v. Walker, 5 Term Rep. 98.

‡ Cates, who, &c. v. Carrington, Hil. T. 29th Geo. III.

§ 25th Geo. III. c. 51.

‖ Cates, who, &c. v. Marſh, Eaſter T. 29th Geo. III.

¶ Same v. Kemp, Hil. T. 29th Geo. III.

paid

paid before the rule is drawn up, and at other times not; but, if it is not paid before the rule is drawn up, it muſt be *when* it is * : however, as ſoon as the rule is drawn up, the above common appointment muſt be got on it to tax the coſts †, which ſhould be ſerved and attended, when the maſter will *tax* the ſame, and give his *allocatur* in the above manner thereon; and then, if the money be not paid by the defendant, agreeable to the rule for ſtaying the proceedings, the court will, after a rule to ſhew cauſe, grant an *attachment* againſt him for the non-payment of it §.

And it ſeems that the court have given leave to compound, on payment of the coſts *only* ‖, but that they will not very readily do it ‡: therefore, in ſuch caſes, as well as in ſome of the others to be found in the books of practice ¶, it may be prudent to ground the application to the court for the leave to compound, on an *affidavit* of the nature of the action, the reaſon of the compoſition, and the other material circumſtances of the caſe.

* Brown, qui tam, v. Bailey, 4 Burr. 1929.

† See p. 26.

§ King, qui tam, v. Clifton, 5 Term Rep. 257.

‖ Loft, 395.

‡ Ibid. 372 and 400.

¶ Tidd, 303; and Impey, 511. 3d ed.

P. } *MONDAY next after three weeks* For a concilium.
D. } *of the Holy Trinity*, is appointed to hear counſel for both parties—upon the motion of Mr. *Wood.*

P. } IT is ordered, that judgement be enter- For judgement.
D. } ed for the *plaintiff*—upon the motion of Mr. *Wood.*

WHEN the parties have joined in demurrer, or in error, or a ſpecial verdict has been found, or a ſpecial caſe made on the trial, in order to bring the matter before the court for their deciſion thereon, the above rule for a *concilium* muſt be obtained; the motion for which is of courſe, without any affidavit in ſupport of it; and it may not be uſeleſs here to obſerve, that it has been held that counſel's *ſigning* the motion-paper for this rule, in the fourth term after the laſt ſtep, was taking *a ſtep* in the cauſe, and made a term's notice of proceeding after that term unneceſſary *.

And in order to ſet the cauſe down thereon, the roll on which the pleadings are entered (except where it is a ſpecial caſe, for there is

* Bland v. Darley, 3 Term Rep. 530.

no

no entry of that made) ſhould be entered with the clerk of the judgements, and then taken, with the motion-paper, after it is ſigned by the counſel, to the clerk of the papers, when his aſſiſtant will mark on the margin of the roll the word "Read," and ſign his initials on the motion-paper, thus, "W. B. R." which muſt then be taken to the clerk of the rules, whoſe clerk will immediately draw up the above rule thereon. The rule ſhould then be taken to the clerk of the papers, and his aſſiſtant will enter it in the cauſe-book for the next paper day, of which there are two in a week, viz. Tueſdays and Fridays, and it is uſual then, though not neceſſary*, to ſerve a copy of the rule at the adverſe party's attorney's.

And when the judgement of the court is given, the following rule for *judgement* thereon is drawn up; which being only an authority to the clerk of the judgements to enter up the judgement on, does not ſeem to require ſervice, but, in practice, it is generally ſerved.

* Forbes v. Lord Middleton, 2 Stra. 1242.

P. } IT is ordered, that the *ſheriff* of *the*
D. } *county of Cornwall* ſhall, at the expence of the *plaintiff*, (1) attend Mr. *Benton*, with the *freeholders book of the ſaid county* (2), and Mr. *Benton*, in the preſence of the attornies of both parties, ſhall name thereout forty-eight good and ſufficient men, being *freeholders of the ſaid county* (3), of whom twelve ſhall be ſtruck out on each ſide, and the remaining twenty-four ſhall be returned by the ſaid *ſheriff*, to try the iſſue between the parties—upon the motion of Mr. *Yorke*.

For a ſpecial jury.

(1) The party applying.

(2) In London, "books or liſts containing the names of the perſons qualified to ſerve on juries in London."

(3) In London, "ſo qualified."

I appoint 2*d March*, 11 *o'clock*, *E. Benton.*
N. B. To name the jury.

I appoint 9*th March*, 11 *o'clock*, *E. Benton.*
N. B. To reduce the jury.

Appointments thereon, to name and reduce the jury.

SPECIAL juries were originally introduced in trials *at bar* *; and it being a matter of doubt whether the court could direct a cauſe to be tried by a ſpecial jury, in trials *not* at bar, without the conſent of the parties, the legiſlature have declared, that on the motion of either of the parties, in any cauſe depending in the courts at Weſtminſter, *ſpecial juries* ſhall be appointed and ſtruck, to try the cauſe †. It

* 3 Black. Com. 357, 7th ed. † 3 G. II. c. 25. ſ. 15.

is therefore quite a motion of courſe for this rule, without any affidavit in ſupport of it; and if the rule is wanted in *vacation* time, an order to the following effect may (in this, as well as in moſt if not every other caſe, where it is a motion of *courſe* for a rule in the *firſt* inſtance) be had at either of the judges chambers, without any ſummons, for the clerk of the rules to be at liberty to draw up the rule.

" *P.* } I order that the clerk of the rules be at
" *D.* } liberty to draw up a rule for a *ſpecial*
" *jury* on the part of the *plaintiff*, on producing
" counſel's hand for that purpoſe. Dated the
" 23d day of *February*, 1795. *Kenyon.*"

And when the rule is drawn up, the attorney for the party applying for it ſhould get the firſt appointment at the foot of the rule from the maſter's clerk to *name* the jury, which ſhould be ſerved at the ſheriff's office, and alſo at the adverſe party's attorney's; and the appointment muſt then be attended by the attorney for the party applying for the ſpecial jury, when the maſter (whether the attorney for the adverſe party attends or not, the firſt appointment being now to be attended*) will extract out of the ſheriff's book the *names* and *additions* of *forty-eight* jurors, though the attornies concerned frequently

* See p. 27, ante.

quently ſave the maſter that trouble, by conſenting to take a jury already named in another cauſe; and the attorney for the party applying then pays the maſter and ſheriff's fees thereon, which is two guineas to the maſter, and two guineas to the ſheriff; and an office copy of the liſt of the jury named is made by the maſter's clerk for each party, who thereupon pays him 5s. each for the ſame.

When this is done, the attorney for the party applying ſhould in like manner get the ſecond appointment at the foot of the rule, from the maſter's clerk, to *reduce* the jury, which ſhould, of courſe, be ſerved at the other party's attorney's, and then attended; when, if both parties attend, the jury is reduced to twenty-four, by each party alternately ſtriking out *twelve*, the attorney for the plaintiff beginning firſt; but if either party does not attend, the maſter then ſtrikes out the twelve for the abſent party *, and the names and additions of the remaining *twenty-four* are inſerted in the diſtringas. And if afterwards the cauſe goes off at niſi prius for default of jurors, no new jury can be ſtruck; but the cauſe muſt be tried by the jury firſt appointed †.

* And ſee Rex v. Hart, eſq. Cowp. 412.

† The King v. Perry and two others, 5 T. R. 453.

For a view.

P. } IT is ordered, That there iſſue a
D. } writ of diſtringas juratores, to be directed to the *ſheriff of the county of Devon*, in which ſhall be contained a clauſe, commanding the ſaid *ſheriff* to have ſix or more of the firſt twelve of the jurors to be impannelled and returned to try the iſſue between the parties at the place in queſtion, before the time of the trial of the ſaid iſſue, to wit, *upon Saturday, the twenty-fifth day of July* next enſuing; and that *A. B.* on the part of the *plaintiff*, and *C. E.* on the part of the *defendant*, ſhall attend the ſame, and ſhew the matters in queſtion to the ſaid ſix or more of the firſt twelve of the ſaid jurors: and that the expence of taking the ſaid view ſhall be equally borne by both parties, and no evidence ſhall be given on either ſide, at the time of taking thereof, the *plaintiff* (1) conſenting, that in caſe no view ſhall be had, or if any view ſhall be had by any of the ſaid jurors, whether they ſhall happen to be any of the twelve jurors who ſhall be firſt named in the ſaid writ or not, yet the ſaid trial ſhall proceed, and no objection ſhall be made on account thereof, or for want of a proper return to the ſaid writ—upon the motion of Mr. *Praed.*

(1) The party applying for the rule.

THE

THE legiſlature having directed the courts at Weſtminſter to grant *views*, in actions there depending, where they ſhould appear proper and neceſſary *, this court ſome few years ago, in a famous cauſe then depending†, ſettled the ſubſtance of the rule for the view thereon; ſince which the above is now become the common rule, and is granted of courſe, without any affidavit, upon the application of either of the parties, on the terms ſpecified in the rule: and it is one of thoſe rules which an *order* to the following effect may be had in *vacation* time, for the clerk of the rules to be then at liberty to draw up‡.

" *P.* } I order that the clerk of the rules be at
" *D.* } liberty to draw up a rule for a *view*, at
" the *plaintiff's* inſtance, on producing coun-
" ſel's hand for that purpoſe. Dated the 20th
" day of *July* 1795. *Kenyon.*"

But before the rule for the view can be drawn up, the *name* of the perſon the other party nominates as his *ſhewer* muſt be got from

* 4 and 5 Anne, c. 16. ſ. 8; and ſee 3 Geo. II. c. 25. ſ. 14.

† Pearſe, eſq. v. the Earl of Faulconberg and others, 1 Burr. 252.

‡ See p. 66 ante.

his attorney (for either party may name his attorney or agent, or any other perſon he pleaſes, as his ſhewer) as the names of both the ſhewers ſhould be inſerted in the inſtructions for the rule, with the *time* the *view* is to be *made*, which may be any day the parties can agree on.

And when the rule is drawn up, a copy of it ſhould be ſerved at the other party's attorney's, and the original left at the ſheriff's office, with the names of the jury, if it is a ſpecial one, who will thereupon ſummon about nine of the jury to meet at a certain hour, at ſome *tavern* or *inn* near the place in queſtion, which the under-ſheriff and parties previouſly fix on; where the under-ſheriff, or ſome perſon from the ſheriff's office, and the ſummoning officer, attend, as well as the attornies and ſhewers; and when the jury come, they all proceed to the place in queſtion, and *the ſhewers ſhew the jury the matters in diſpute*, and afterwards it is uſual to adjourn to the place of meeting, where the jury take ſome refreſhment and depart, and the attornies then pay the expence of the meeting between them, as well as the ſheriff, officer, and jury's fees; which is two guineas to the ſheriff, two guineas to the officer, and one guinea each to the jury, if it be a ſpecial one; but if a common one, then half a guinea each.

UPON

P. } UPON reading the affidavit of *A. B. gentleman*, (1) It is ordered, that the attornies for both parties ſhall attend the maſter, who ſhall examine the matter, and tax the *defendant his* coſts, for that the *plaintiff* hath not proceeded to trial, purſuant to *his* notice: which coſts, when taxed, ſhall be paid by the ſaid *plaintiff*, if it ſhall appear to the maſter that coſts ought to be paid—upon the motion of Mr. *Adam*.

For coſts for not proceeding to trial purſuant to notice.
(1) The defendant's attorney's affidavit of the facts.

I appoint *6th May*,
ſix o'clock,
E. Benton.

Appointment.

P. } UPON reading the rule made in this cauſe, on *Saturday*, [*&c.*] (1) and the affidavit of *C. G. gentleman*, (2) It is ordered, that the *defendant*, upon notice of this rule, to be given to *his* attorney, ſhall, upon *the ſecond day of the next term*, ſhew cauſe why the ſaid rule ſhould not be diſcharged—upon the motion of Mr. *Erſkine*.

Niſi to diſcharge it.
(1) The above rule.
(2) The plaintiff's attorney's affidavit of the facts.

P. } UPON reading the rule made in this cauſe, on *Monday*, [*&c.*] (1) the affidavit of *H. J. gentleman*, (2) and upon hearing

Abſolute thereon.
(1) The rule niſi.
(2) The defendant's attorney's affidavit of the facts.

ing counſel for both parties; It is ordered, that the rule made in this cauſe on *Saturday*, [*&c.*] (3) be diſcharged—upon the motion of Mr. *Erſkine* for the *plaintiff*, and Mr. *Palmer* for the *defendant*.

(3) The rule for the coſts.

IF the plaintiff gives notice of trial, but does not proceed to trial accordingly, nor countermand the notice in time, it is a motion of courſe, for the above rule, for the *extra coſts* occaſioned by ſuch neglect, on a ſhort affidavit of the facts; and upon which the appointment muſt be got from the maſter's clerk, and ſerved, and attended with a bill of the coſts applied for, when the maſter will tax the ſame on the firſt appointment*, if no *reaſonable* cauſe can be ſhewn on the part of the plaintiff for his not proceeding to trial.

But as every act of the maſter is liable to be *reviewed*, on appeal to the court, (though in judging of ordinary ſtages of practice he is inveſted with original and competent juriſdiction)† if either of the parties ſhould be diſſatisfied with the maſter's deciſion, he may

* See p. 27, ante.

† 2 Wynne's Eunomus, 156.

appeal

appeal therefrom, by an application to the court, ſupported by an affidavit of the facts, either for the maſter to *review* his taxation, or to *diſcharge* the rule for the coſts, as the caſe may happen to be.

As where the plaintiff, in an action which ſtood for trial in the cauſe-paper, at the Lent aſſizes at Maidſtone, 1789, *withdrew the record*, in conſequence of the late Mr. Juſtice Gould having *nonſuited* the plaintiff in a ſimilar action, which ſtood in the paper, and came on to be tried before it, on a point which would alſo have ariſen in the action in which the record was withdrawn; and the nonſuit having afterwards been ſet aſide by the court, on account of the *miſdirection* of the judge *; and the defendant having obtained the above rule for coſts, for not going on to trial, the plaintiff applied, on an affidavit of the circumſtances, to diſcharge it, when the court held the *reaſon* for withdrawing the record *ſufficient*, and therefore granted the above rule niſi to diſcharge the rule for the coſts; and after hearing the other ſide made it abſolute, and the laſt of the above rules was drawn up thereon †.

* See the caſe Cates, who, &c. v. Winder, 81 poſt.

† Same v. Melliſh, T. T. 29 Geo. III.

UPON

Nil. for judgement, as in the caſe of a non-ſuit.

(1) Of the facts.

P. D. } UPON reading the affidavit of *A. B.* (1) and the entry of the iſſue on record; It is ordered, that the *plaintiff*, upon notice of this rule to be given to *his* attorney, ſhall, upon *Monday*, [*&c.*] ſhew cauſe why the like judgement ſhould not be given for the *defendant* as in the caſe of a nonſuit, purſuant to the ſtatute in that caſe made and provided—upon the motion of Mr. *Ruſſell*.

Diſcharging the rule niſi, on a peremptory undertaking.

(2) The rule niſi.

(2) The plaintiff's attorney's affidavit of the facts.

(3) If in the country, "next aſſizes to be held for the *county of Kent*," &c.

P. D. } UPON reading the rule made in this cauſe, on *Monday*, [*&c.*] (1) *in this term*, the affidavit of *E. F. gentleman*, (2) upon hearing counſel for both parties, and upon the undertaking of the *plaintiff* to bring on the iſſue in this cauſe to be tried at the *ſitting after this term for London* (3); It is ordered, that the ſaid rule be diſcharged, and further time is allowed to the *plaintiff* to bring on the iſſue to be tried purſuant to *his* undertaking; and the ſame is then peremptorily to be brought on to be tried—upon the motion of Mr. *Erſkine* for the *plaintiff*, and Mr. *Bower* for the *defendant*.

UPON

P. } UPON reading the rule made in this
D. } cauſe, on *Monday*, [*&c.*] (1) the affidavit of *G. H. gentleman*, (2) and upon hearing counſel for both parties; It is ordered, that the like judgement be entered for the *defendant* as in the caſe of a nonſuit, purſuant to the ſtatute in that caſe made and provided—upon the motion of Mr. *Palmer* for the *plaintiff*, and Mr. *Lawes* for the *defendant*.

Abſolute for judgement, as in the caſe of a nonſuit, on hearing both parties.

(1) The rule niſi.

(2) The plaintiff's attorney's affidavit of the facts.

P. } UPON reading the rule made in this
D. } cauſe, on *Monday*, [*&c.*] (1) the affidavit of *A. B.* (2) and no cauſe being ſhewn to the contrary; It is ordered, that the like judgement be entered for the *defendant* as in the caſe of a nonſuit, purſuant to the ſtatute in that caſe made and provided—upon the motion of Mr. *Ruſſell*.

The like. No cauſe ſhewn.

(1) The rule niſi.

(2) Of the ſervice of the rule niſi.

THE legiſlature having authorized the court to give judgement for the defendant, as in the caſe of a *nonſuit*, in default of the plaintiff's proceeding to trial in due time *, if he

* 14 Geo. II. c. 17. ſ. 2.

does not give notice of trial in the term ſucceeding that in which the iſſue was joined *, or proceed to trial purſuant to his notice, the defendant may apply to the court for judgement, as in the caſe of a nonſuit, without any notice of the motion † (even though no proceedings have been had for *four* terms; for it is held that the rule requiring a term's notice of proceeding in that caſe does not extend to this motion ‡) on a ſhort affidavit of the facts, and on which the above rule niſi will be granted, that is ſuppoſing the iſſue is entered; for that muſt firſt be done, as the rule is drawn up upon reading the entry of the iſſue on record, as well as the affidavit, ſo that the entry of the iſſue is ſuppoſed to be read at the time of the motion; but that is now diſpenſed with, and the practice is to get the clerk of the papers to mark the roll "Read," either in the treaſury, before the court ſits, or in court at the time the motion is made.

But a *peremptory* undertaking is in general now ſufficient to diſcharge the rule niſi on the *firſt* application, except in penal actions; for this rule is granted in *qui tam* actions, as well

* Hall v. Buchannan, 2 Term Rep. 734.

† And ſee Loft, 265.

‡ Doe, on the demiſe of Phillips and others, v. Moſes, 5 Term Rep. 634.

as

as others *, and in ſuch the court will expect a *real* excuſe; but the *inſolvency* of the defendant, ſince the commencement of the action has been held a ſufficient one with a *peremptory* undertaking †: and a rule to the effect of the ſecond of the above rules is drawn up thereon; and though the rule niſi be diſcharged on an affidavit which contains an anſwer falſe in itſelf, yet the court will not afterwards open the matter, on an affidavit diſproving the contents of the former one, as the coſts is the only object of ſuch an application ‡.

And if the plaintiff *afterwards* does not proceed to trial, purſuant to his undertaking, the court will, on a ſhort affidavit of the facts, accompanied by an office copy of the peremptory rule, which ſhould previouſly be got from the clerk of the rules' office, grant another rule niſi, on the ſhewing cauſe againſt which the court will expect a *reaſonable* excuſe; and the *inſolvency* of the defendant, after the action brought, has been held a ſufficient one §: but if the cauſe ſhewn be *inſufficient*, the rule niſi will be made abſolute, and the rule thereon will be drawn up to the effect of the third of the above rules; and

* Watſon, qui tam, v. Jackſon, 1 Wil. 325. 4th ed. But ſee Sayer, 22. S. C.

† Cates, who, &c. v. Palmer, E. T. 29 Geo. III.

‡ Davies v. Cottle, 3 Term Rep. 405.

§ Bailly v. Wilkinſon, Doug. 646.

ſo

ſo will either of the rules niſi be made abſolute, if no cauſe be ſhewn againſt them, on an affidavit of the ſervice of the rule, and then the abſolute rule thereon is drawn up to the effect of the laſt of the above rules.

But in *replevin*, the rule will not be granted, as both parties are actors, and the defendant may carry down the record by proviſo *; nor where the plaintiff has *once* carried down the record for trial, as after that the defendant ſhould carry it down by proviſo †: neither will the rule be granted until *after* the term ſucceeding that in which the iſſue is joined, if the plaintiff do not give notice of trial, even though it may have been joined early enough in the term for the plaintiff in a town cauſe to have given notice of trial for the ſittings after the term ‡; nor unleſs *all* the defendants apply for it ‖: neither can *one* of two defendants have judgement, as in the caſe of a nonſuit, *at all*, if the other defendant has let judgement go by *default* §.

* Jones v. Concannon, 3 Term Rep. 661; and Shortridge v. Hiern, 5 Term Rep. 400.

† King v. Pippett, 1 Term Rep. 492; and Mewburn v. Langley, 3 Term Rep. 1.

‡ Munt and another v. Tremamondo, 4 Term Rep. 557.

‖ Watſon, qui tam, v. Jackſon, Boys, and Webſter, Sayer 22; and Jennings, qui tam, v. Wilſon and two others, ib. 103.

§ Weller v. Goyton and Walker, 1 Burr. 358.

IT

P. } IT is ordered, that the *plaintiff*, upon notice of this rule, to be given to *his* attorney, ſhall, upon *Saturday*, [*&c.*] ſhew cauſe why the *nonſuit* (1) obtained in this cauſe, ſhould not be ſet aſide, and a new trial had between the parties; and that in the mean time further proceedings in this cauſe be ſtayed—upon the motion of Mr. *Erſkine*.

Niſi to ſet aſide a nonſuit, and for a new trial thereon.

(1) Or "verdict."

P. } UPON reading the rule made in this cauſe, on *Wedneſday*, [*&c.*] (1) and upon hearing counſel for both parties, It is ordered, that the *nonſuit* (2) obtained in this cauſe be ſet aſide, and a new trial had between the parties—upon the motion of Mr. *Erſkine* for the *plaintiff*, and Mr. *Rous* for the defendant.

Abſolute thereon.

(1) The rule niſi.

(2) "Or verdict."

P. } UPON reading the rule made in this cauſe, on *Monday*, [*&c.*] (1) and upon hearing counſel for both parties, It is ordered, that the ſaid rule be diſcharged; and it is referred to the maſter to tax the *plaintiff his* coſts occaſioned by this application; which coſts, when taxed, ſhall be paid by the *defendant* to

Diſcharging the rule niſi, with coſts.

(1) The rule niſi.

to the *plaintiff* or his attorney—upon the motion of Mr. *Mingay* for the *plaintiff*, and Mr. *Erſkine* for the *defendant*.

IF a *verdict* has been obtained, or the plaintiff has been *nonſuited* by the miſtake or *miſdirection* of the judge at niſi prius, even in a penal action*, the court will, after a rule to ſhew cauſe, *without* any affidavit of the facts, (unleſs the judge who tried the cauſe happen to die in the intermediate time; for then it ſeems the courſe is for the account of the cauſe to be brought before the court upon affidavit †) ſet it aſide *without* coſts ‡.

As where, in a *penal* action, *a notice to produce papers on the trial* had been ſerved on the *defendant's attorney*, and the late Mr. Juſtice Gould, who tried the cauſe at the Maidſtone aſſizes, 1789, had nonſuited the plaintiff, becauſe the notice was not ſerved on the *defendant himſelf*; the court, on a motion to ſet the nonſuit aſide, being of opinion the *ſervice* was *ſufficient*, granted the above rule niſi for that purpoſe, and

* Wilſon v. Raſtall, 4 Term Rep. 753.

† The King v. Daniel Holt, 5 Term Rep. 436.

‡ Pochin v. Pawley, 1 Sir W. Black. 670; Rice v. Shute, 2 Sir W. Black. 695; and 5 Burr. 2611. S. C. afterwards

afterwards made the ſame abſolute, and the ſecond of the above rules was drawn up thereon*.

The rules for a *new trial* will alſo be granted in a variety of other caſes, where the grounds are ſufficient in the opinion of the court, moſt of which are to be found in the books of practice †. And in ſuch caſes, if the point has been ſaved at niſi prius, or the facts on which the application is founded will appear on the judge's report who tried the cauſe, the rule niſi may be obtained *without* any affidavit in ſupport of it; but if the point has not been ſaved, or the facts will not appear from the report, there muſt be an *affidavit* of the circumſtances. And if, on ſhewing cauſe againſt the rule niſi, the opinion of the court is with the verdict or nonſuit, they will frequently *diſcharge* the rule *with* coſts, and then the rule thereon is drawn up to the effect of the laſt of the above rules.

It has been ſaid, that when a new trial is granted, it is always *upon* payment of coſts

* Cates, who, &c. v. Winder, reported in 3 Term Rep. 306, by the name of Cates, qui tam, v. Winter.

† Sellon, 515; Tidd, 601; Impey, 262, 3d ed.

to the party in poſſeſſion of the verdict *; but the rule does not ſeem to be quite ſo general, for verdicts and nonſuits obtained by the miſtake or miſdirection of the judge at niſi prius are now conſtantly ſet aſide, and new trials directed thereon, *without* coſts †; and ſo verdicts have been ſet aſide, and new trials granted without coſts, where they have been obtained by a trick ‡, or an unfair advantage §, or contrary to law and the judge's opinion ‖.

So it has been ſaid to be the practice of this court, that the rule niſi muſt be moved for *within* four days of the beginning of the term, including the firſt, if the cauſe was tried in the preceding vacation; but that the court will, under particular circumſtances, permit the new trial to be moved for after the four days are

* Bright, executor of Hannah Criſp, widow, v. Eynon, 1 Burr. 390.

† See p. 80, ante.

‡ Montpeſſon v. Randle, Bull. Niſi Prius, 328.

§ Anderſon v. George, 1 Burr. 352.

‖ Pochin v. Pawley, 1 Sir W. Black. 670; Edie and another v. the Eaſt India Company, ibid. 295, and 2 Burr. 1216, S. C.

expired;

expired*: and in a late caſe† it was held, that the defendant could not be heard upon a motion for a new trial after the *firſt four days* of the term, and that the rule was the ſame in civil as in criminal caſes.

But as the rule for judgement cannot regularly be entered till the return day of the diſtringas, which, if the cauſe be tried in vacation, is commonly the firſt day of the term, and which does not expire till *four* days after, *excluſive* of the day it is entered, *i. e.* if entered on the third it will not expire till the ſeventh; and if a *Sunday*‡, or any other day on which the court does *not* ſit, intervene, then not till the eighth, until after which day the final judgement on the poſtea cannot be ſigned: and as it is ſaid the party is allowed this time either to move for a new trial, or in arreſt of judgement§, it ſeems as if he has *four days excluſive of the firſt*, or five including it, beſides the further time for the days on which the court may not ſit.

* Birt v. Barlow, Doug. 162.

† The King v. Daniel Holt, 5 Term Rep. 436.

‡ 4 Burr. 2130.

§ Boote's Suit at Law, 179, 2d ed. Richardſon's Pr. 274, 5th ed.; and Impey's Pr. 256, 3d ed.

But it does not ſeem that the plaintiff has this time to move for a new trial on a *nonſuit*, inaſmuch as there is no rule for judgement given in that caſe, and the judgement thereon may be ſigned immediately after the return of the diſtringas*.

* Richardſon's Pr. 275, 5th ed.

IT

P. } IT is ordered that the *plaintiff*, upon notice of this rule to be given to *his* attorney, ſhall, upon *Saturday* [*&c.*] ſhew cauſe why the judgement *on the ſixth, ninth, and twelfth counts*, (1) ſhould not be arreſted, and that in the mean time further proceedings in this cauſe be ſtayed—upon the motion of Mr. *Palmer*.

Niſi to arreſt the judgement.

(1) Being the counts on which the verdict was taken; but if the verdict be taken *generally*, then this part is not inſerted.

P. } UPON reading the rule made in this cauſe on *Saturday* [*&c.*] (1) and upon hearing counſel for both parties; It is ordered, that the judgement *on the ſixth, ninth, and twelfth counts* be arreſted—upon the motion of Mr. *Erſkine* for the *plaintiff*, and Mr. *Palmer* for the *defendant*.

Abſolute thereon.

(1) The rule niſi.

BEFORE the judgement is entered up, it may be *arreſted* for various cauſes to be found in the books*; and the mode of doing it is to move the court in arreſt of the judge-

* 3 Black. Com. 393, 7th ed; Sellon's Pr. 523; and Tidd's Pr. 612.

ment; who thereupon grant a rule nisi, the motion for which requires no affidavit in support of it, inasmuch as the ground of the application must appear *on the record**; for the court will not arrest the judgement upon matters not appearing on the face of it, because they are to judge upon the record itself †.

As where, in an action for penalties under the post-horse act ‡, the jury at the trial found a verdict for the plaintiff, on the 6th, 9th, and 12th counts of the declaration, for three penalties of ten pounds each; the court, on a motion in arrest of judgement, being of opinion the act had *ousted* the jurisdiction of the superior courts as to those penalties, granted the above rule nisi to arrest the judgement, and afterwards made it absolute, and the above rule was drawn up thereon §; and similar rules were also made at the same time in another action of the like nature ‖.

* Pechey v. Harrison, 1 Lord Raym. 232; and 3 Black. Com. 393, 7th ed.

† Sutton v. Bishop, 4 Burr. 2283.

‡ 25th Geo. III. c. 51. s. 15 and 28.

§ Cates, qui tam, v. Knight, 3 Term Rep. 442.

‖ Same v. Mellish, ib.

The

The motion in arreſt of judgement may be made at any time *before* the judgement is entered, even after a rule niſi for a new trial has been diſcharged *; but it cannot be made *after* there has been judgement in *demurrer*, for an exception that *might* have been taken on arguing the demurrer †; and if the defendant means to apply for a new trial, and move in arreſt of the judgement too, the motion for a new trial muſt *precede* the one in arreſt of judgement; as a motion for a new trial cannot be made after a motion in arreſt of judgement: and the court, if they grant a rule niſi for a new trial, will, at the inſtance of the party applying, make it part of the rule that the defendant ſhall have a certain *ſpecific* time, *e. g.* three days, to move in arreſt of judgement, after they ſhall have given their opinion upon the motion for a new trial ‡; or will grant the rule niſi in the *alternative*, *i. e.* to ſhew cauſe why a new trial ſhould not be granted, or the judgement arreſted ‖; and if the court arreſt the judgement, each party muſt then pay their own coſts §.

* Taylor v. Whitehead, Doug. 716.

† Edwards v. Blunt, 1 Stra. 425.

‡ Rex v. White and Ward, 1 Burr. 333.

‖ Cameron et al. v. Reynolds, under-ſheriff, Cowp. 403.

§ Ibid.

Niſi to retain the damages and coſts in one action towards ſatisfaction of the debt and coſts in another, between the ſame parties. (1) Of the facts.

A. B. in treſpaſs. } UPON reading the affi-
B. A. in debt. } davit of *E. F. gentleman, and another*, (1) It is ordered, that the *plaintiff* in the firſt cauſe, upon notice of this rule to be given to *his* attorney, ſhall upon *Saturday next* ſhew cauſe why *B. B. the defendant* in the ſaid firſt cauſe, and *plaintiff* in the ſecond, ſhould not be at liberty to retain in *his* hands the *damages* recovered at *the laſt aſſizes held at the caſtle of Exeter, in and for the county of Devon*, by the ſaid *A. A. the plaintiff* in the ſaid firſt-mentioned cauſe, together with *his* coſts therein, towards ſatisfaction of the *debt* recovered againſt the ſaid *A. A.* at the ſame *aſſizes*, by the ſaid *B. B.* in the ſaid laſt-mentioned cauſe, and *his* coſts, to be taxed therein; and that all further proceedings therein be ſtayed—upon the motion of Mr. *Gibbs*.

Abſolute there- (1) The rule niſi. (2) Of the ſervice of the rule niſi.

A. B. in treſpaſs. } UPON reading the rule
B. A. in debt. } made in this cauſe, on *Wedneſday* [*&c.*] (1) the affidavit of *G. H.* (2) and no cauſe being ſhewn to the contrary; It is ordered, that *B. B.* the *defendant* in the ſaid firſt cauſe,

cauſe, and *plaintiff* in the ſecond, be at liberty to retain in *his* hands the *damages* recovered at *the laſt aſſizes held at the caſtle of Exeter, in and for the county of Devon*, by *A. A.* the *plaintiff* in the ſaid firſt-mentioned cauſe, together with *his* coſts therein, towards ſatisfaction of the *debt* recovered againſt the ſaid *A. A.* at the ſame *aſſizes*, by the ſaid *B. B.* in the laſt-mentioned cauſe, and *his* coſts to be taxed therein —upon the motion of Mr. *Gibbs*.

IT is the courſe of the court now to permit money recovered by judgement in croſs actions to be *ſet off**, even though a third perſon is concerned †; and they will therefore, in ſuch caſes, on a motion, ſupported by a ſhort affidavit of the facts, grant a rule niſi of the above nature, and afterwards make it abſolute, whether it is oppoſed or not; which was the reaſon no cauſe was ſhewn againſt this rule niſi, and thereupon it was made abſolute,

* Baſkerville v. Brown, and Brown v. Baſkerville, 2 Burr. 1229; and Wills and Crabb, Bull. Ni. Pri. 336.

† Mitchell v. Oldfield, 4 Term Rep. 123.

and

and the laſt of the above rules was drawn up thereon *. But as the *attorney* for the party againſt whom the application is made has a *lien* for his coſts in the matter on the money recovered by his client †, if he inſiſts on it, when the application is made, the court will not diveſt him of his lien, but direct him to be *paid, before* they permit the ſet-off to be made ‡; indeed ſo careful are the court that the attorney ſhall be paid, that where the defendant's attorney paid the plaintiff himſelf the debt and coſts recovered, *after notice* from the plaintiff's attorney not to do ſo, becauſe their bill was not ſatisfied, the court ordered the former to pay over again to the latter the amount of their lien on ſuch debt and coſts ‖.

* Froſt v. Woolcombe, and Woolcombe v. Froſt, E. T. 37th Geo. III.

† Welch v. Hole, Doug. 226.

‡ Mitchell v. Oldfield, 4 Term Rep. 123.

‖ Read v. Dupper, 6 Term Rep. 361.

P. } IT is ordered, that an order of niſi prius
D. } made at *the ſitting held at Guildhall*, in and for *the city of London*, on *Tueſday* the *4th* day of *March laſt paſt*, before *the Right Honourable Lloyd Lord Kenyon, Lord Chief Juſtice of this court, aſſigned to hold pleas in this court*, be entered and made a rule of this court: which ſaid order is in the words following; to wit, It is ordered by the court, by and with the conſent of the *plaintiff* and *defendant*, their counſel and attornies, that *it be, and it is hereby referred to A. B. of London, merchant, to take and ſettle the accounts between the plaintiff and the defendant; and that a verdict ſhall be entered for ſuch ſum as ſhall be found due by the ſaid arbitrator, from the defendant to the plaintiff*, ſo as *he* ſhall make and publiſh *his* award in writing, of and concerning the premiſes in queſtion, on or before the *ſecond* day of *Michaelmas term now next enſuing*, and that the ſaid parties ſhall and do perform, fulfil, and keep ſuch award, ſo to be made by the ſaid *arbitrator* as aforeſaid. And it is alſo ordered, by and with ſuch conſent as aforeſaid, that the coſts of this cauſe ſhall abide

Making an order of niſi prius a rule of court.

Or, ("The jury find a verdict for the *plaintiffs*, damages 3,300*l.* coſts 40*s.* ſubject to this order, and the award to be made purſuant thereto; and that *all matters in difference between the parties in this cauſe* ſhall be referred to the award, order, arbitrament, final end and determination of *A. B. C D.* and *E. F.* all of *London, merchants.*")

abide the event and determination of the ſaid award, and that the coſts of the reference ſhall be in the diſcretion of the ſaid *arbitrator*, who ſhall direct and award by whom, and to whom, and in what manner, the ſame ſhall be paid. And it is likewiſe ordered, by and with ſuch conſent as aforeſaid, that the *plaintiff* and *defendant* reſpectively are to be examined upon oath, to be ſworn before the Lord Chief Juſtice, or ſome other Judge of the ſame court of our Lord the King, before the King himſelf, if thought neceſſary, by the ſaid *arbitrator*, and to produce before the ſaid *arbitrator* all books, papers, and writings, touching or relating to the matters in difference between the ſaid parties, as the ſaid *arbitrator* ſhall think fit; and that the witneſſes of the *plaintiff* and *defendant* reſpectively are to be examined upon oath, to be ſworn before the Lord Chief Juſtice, or ſome other Judge of the ſame court. And it is alſo ordered, by and with ſuch conſent as aforeſaid, that neither the *plaintiff* or the *defendant* ſhall proſecute or bring any action or ſuit, in any court of law or equity, againſt the ſaid *arbitrator*, or bring or prefer

any

any bill in equity againſt each other, of and concerning the premiſes ſo as aforeſaid referred. And it is further ordered, by and with ſuch conſent as aforeſaid, that if either *party* ſhall, by affected delay or otherwiſe, wilfully prevent the ſaid *arbitrator* from making *his* award, *he* ſhall pay ſuch coſts to the *other* as the court of our Lord the King ſhall think reaſonable and juſt. And laſtly, it is ordered, by the like conſent as aforeſaid, that the ſaid court of our Lord the King may be prayed, that this order may be made a rule of the ſame court—upon the motion of Mr. *'Eſpinaſſe.*

P. } UPON reading the order of niſi prius, *this day* made a rule of court, and by the conſent of counſel for both parties; It is ordered, that the time limited for the *arbitrator's* making *his* award in this cauſe be enlarged for *fourteen days next enſuing*—upon the motion of Mr. *'Eſpinaſſe*, for the *plaintiff*, and Mr. *Chambre* for the *defendant*.

Enlarging the time for the arbitrator's making his award.

WHEN

WHEN a cauſe is *referred* at niſi prius, and either party have afterwards occaſion to apply to the court thereon, as for inſtance to *enlarge* the time for the arbitrator's making his award (the motion for which is *of courſe*, without any affidavit of the facts, on the application of one party, and *conſent* of the other) the order of niſi prius muſt at the ſame time, if not previouſly done, be made a rule of court; the motion for which is alſo of courſe *, without any affidavit of the facts, on the application of *either* party, and the rules thereon will be drawn up to the above effect.

The order of niſi prius, made an order of court of by the above rule, is the common one on a reference at niſi prius in London and Middleſex; and it may be obſerved that it ſeems prudent, on the part of the plaintiff, always to have a verdict taken for a *certain ſum*, ſubject to the reference; as it is ſaid, if there be bail in the action they will otherwiſe be diſcharged †; and it alſo ſeems the ſum ſhould be a *ſufficient* one to cover the plaintiff's demand, as it is ſaid if the award be for a leſs ſum than the verdict, the plaintiff

* Rex v. Addington, Sayer, 259.

† Sellon's Pr. 483.

may

may levy the equitable coſts out of the exceſſes *.

And it muſt always be remembered, that the ſubmiſſion to the reference of *all matters in difference between the parties in the cauſe* is not confined to the ſubject matter in the particular action then depending, but will extend to croſs demands between the parties, but a reference of *all matters in difference in the cauſe between the parties* is confined ſolely to the matters in diſpute in that action †; and in order to mark the diſtinction between the two references the more clearly, it has been recommended that the words of the former reference ſhould be *of all matters in difference between the parties*, omitting the words "in the cauſe," and the latter *all matters in difference in the cauſe*, omitting "between the parties ‡."

The clauſe that the coſts in the cauſe ſhall abide the event, means only the *legal event*, and therefore the plaintiff is not entitled to coſts, if the arbitrator award him a leſs ſum than would

* Impey's Pr. 653, 5th ed.

† Malcolm and another, aſſignees, &c. v. Fullarton, 2 Term Rep. 645.

‡ Smith v. Muller, 3 Term Rep. 624.

carry,

carry coſts on a verdict*; nor are executors liable to coſts on ſuch a reference, other than they would have been on a verdict †; and the coſts meant are only the *common coſts* between *party and party*; and if the arbitrator award more as coſts between *attorney and client*, the court will, after a rule niſi, ſet that part of the award aſide ‡. And if either party, after the order of niſi prius is made a rule of court, file a *bill in equity* reſpecting the matters referred, the court will grant an *attachment* againſt him, and at leaſt make him diſmiſs the bill, and pay all the coſts occaſioned by ſuch miſconduct §.

* Swinglehurſt v. Altham and another, 3 Term Rep. 138.

† Loft, 391; and Highnam and another, executors, &c. v. Haſſell, cited in Swinglehurſt v. Altham and another.

‡ Marder v. Cox, Cowp. 127.

§ Rex v. James Wheeler, 3 Burr. 1256.

UPON

P. } IT is ordered, that the attorney for the *plaintiff* ſhall give notice to Mr. *H.* attorney for the *defendant*, of the time of taxing coſts between the parties, that he may be preſent if he thinks fit. To be preſent at taxing coſts.

Side bar.

WHEN the action is decided, and the attorney for the ſucceſsful party is intitled to ſign his judgement, and conſequently to tax his *increaſed* coſts thereon, the attorney for the unſucceſsful party may get this rule to have notice of the time of *taxing* the coſts, and thereby an opportunity of ſeeing what the maſter allows, and of objecting to any improper charge that may be made before the maſter; who, after hearing both parties, will decide whether the charge objected to, or any and what part of it, ought to be allowed, and will thereupon allow or diſallow it accordingly.

But if the charge in diſpute be of any magnitude, and the party againſt whom the maſter gives his opinion is *diſſatisfied* therewith, it may be adviſeable for him to appeal therefrom *, by

* See p. 72, ante.

an application to the court, on an affidavit of the facts, for the maſter to *review his taxation*; when the court will grant a rule niſi, if they ſhould not be ſatisfied with the maſter's deciſion, which will afterwards be made abſolute, or not, as the ultimate opinion of the court may happen to be.

And if the ſucceſsful party is intitled to tax his coſts the ſame day the rule to be preſent is ſerved, the notice of the taxation ſhould be *immediately* given; but if he is not intitled to tax them ſo early, then the unſucceſsful party's attorney ſhould at leaſt have a *day*'s notice: this notice it is cuſtomary, among the reſpectable part of the profeſſion at leaſt, *to give*, whether a rule be taken out for the purpoſe or not, and which is uſually to the following effect.

" In the King's Bench.

" *P.* againſt *D.*

" *Sir*,

" *I* ſhall tax the coſts in this cauſe " *to-morrow evening*, at *ſix* o'clock.

" To Mr. *W. H. Lincoln's Inn*," " *W. D. Gray's Inn*,"
" Defendant's *attorney*." " Plaintiff's *attorney*."

" 10th *June* 1795."

UPON

P. } UPON reading the affidavit of *A. B.* *gentleman* (1), It is ordered, that the *plaintiff*, upon notice of this rule to be given to *him*, or *his* attorney, ſhall, upon *Monday*, [*&c.*] ſhew cauſe why the proceedings in the action brought againſt the bail of the *defendant*, upon their recognizance, ſhould not be ſtayed until the determination of the writ of error now depending on the judgement in this cauſe, and that in the mean time further proceedings be ſtayed—upon the motion of Mr. *Baldwin*.

Niſi to ſtay the proceedings againſt the bail, pending a writ of error.

(1) The defendant's attorney's affidavit of the facts.

P. } UPON reading the rule made in this cauſe, on *Friday*, [*&c.*] (1) *the affidavit of C. E. gentleman* (2), *and the affidavit of F. G. gentleman* (3), and upon hearing counſel for both parties; It is ordered, that further proceedings againſt the bail of the *defendant* be ſtayed, until the writ of error, now depending on the judgement in this cauſe, ſhall be determined; and, with the conſent of the ſaid bail, it is further ordered, that the ſaid

Abſolute thereon

(1) Rule niſi.

(2) Of the ſervice of the rule.

(3) The plaintiff's attorney's affidavit of the facts.

bail ſhall, within four days next after the determination of the ſaid writ of error, in caſe the ſame ſhall be determined in favour of the *defendant* in error, ſurrender the *defendant* into the cuſtody of the marſhal of the marſhalſea of this court—upon the motion of Mr. *Lambe* for the *plaintiff*, and Mr. *Baldwin* for the *defendant*.

WHEN the plaintiff proceeds againſt the bail on their recognizance, and the defendant brings a writ of error on the judgement, and *before* the bail are fixed, *i. e.* before the time for their ſurrendering the defendant is expired, applies, as he may do, on a ſhort affidavit of the facts, to ſtay the proceedings againſt the bail pending the writ of error, it is a motion of courſe for the above rule niſi thereon, and which will afterwards be made abſolute * on an affidavit of the ſervice, if there be no cauſe ſhewn, or, on ſhewing cauſe, if it is oppoſed; and then the abſolute rule is drawn up to the above effect.

* Capron v. Archer, 1 Burr. 340.

But

But if the application be not made until *after* the time for ſurrendering the defendant is expired, the bail are not at liberty to ſurrender him, but will be ordered to *pay the money* within *four* days after the affirmance of the judgement *, *i. e.* the final affirmance of it †.

The court, however, will *not* ſtay the proceedings, if it appear plainly and unequivocally to them that the writ of error is brought merely *for delay* ‡, as if the party himſelf confeſs §, or his attorney ‖, or bail ¶, declare that the writ of error is brought only for delay, or uſe expreſſions equivalent to ſuch a declaration **. But the plaintiff's ſwearing, that the writ of error is brought for delay, is *not* ſufficient to induce the court not to ſtay

* Richardſon v. Jelly, 2 Stra. 1270.

† Kerſhaw v. Cartwright and Pearce, bail of Green, 5 Burr. 2819.

‡ Entwiſtle and others v. Shepherd and others, 2 Term Rep. 78; Carter v. Roberts, and Butt v. Mow, ibid.; and Kempland v. Macauley and another, 4 Term Rep. 436.

§ Pool v. Charnock, 3 Term Rep. 79.

‖ Law v. Smith, 4 Term Rep. 436.

¶ Evans v. Gilbert, ibid.

** Maſterman v. Grant, 5 Term Rep. 714.

the proceedings *, nor is the writ of error's being brought on a judgement of nonſuit of itſelf a ſufficient ground for that purpoſe †, though the court in one caſe *refuſed* to ſet aſide a defendant's execution for the coſts of a nonſuit, ſued out after a writ of error was brought, and the allowance of it ſerved ‡.

Neither will the court permit execution to be taken out pending a writ of error in parliament, merely becauſe the defendant ſuffered the judgement to be affirmed in the exchequer chamber *without* argument §: and if the plaintiff brings an action on the judgement, the court will give the defendant leave to *imparle* until the determination of the writ of error ‖; but if the defendant obtains no ſuch leave, and the plaintiff proceeds on, and recovers, yet he *cannot* ſue out *execution* on the ſecond judgement until the writ of error be determined ¶.

* Chriſtie v. Richardſon, 3 Term Rep. 78.
† Levett v. Perry, 5 Term Rep. 669.
‡ Kempland v. Macauley and another, 4 Term Rep. 436.
§ Harriſon v. Grote, 6 Term Rep. 400.
‖ Newton v. Swymmer, Sayer, 43.
¶ Benwell v. Black, 3 Term Rep. 643.

IT

P. } IT is ordered, that the marſhal of the
D. } marſhalſea of this court ſhall bring the *defendant* into this court, within three days next after notice of this rule to be given to him; or ſhall give a note in writing under his hand, acknowledging the *defendant* to be in his actual cuſtody; or ſhall ſhew cauſe to the contrary within the time aforeſaid, upon notice thereof being given to the attorney for the *plaintiff*.

Side Bar.

For the marſhal to acknowledge the defendant to be in his cuſtody.

I do hereby acknowledge the within-named *defendant* to be a priſoner in my cuſtody, at the ſuit of the within named *plaintiff*. Dated the 30*th April*, 1793.

W. Jones, marſhal.

The marſhal's acknowledgement thereon.

BEFORE a priſoner in the cuſtody of the marſhal can be charged *in execution*, it is neceſſary to get the marſhal's acknowledgement of the priſoner's being in his cuſtody; in order to do which, the above rule muſt be got from the clerk of the rules' office, and left at

the office of the clerk of the papers of the king's bench priſon, and which may commonly be had again the following day, with the marſhal's *acknowledgement* thereon, to the above effect, wrote either at the foot or on the back of the rule. And this acknowledgement of the marſhal's muſt be *of the ſame term* the defendant is charged in execution; for if there be none of that term, the court will diſcharge the defendant for want of it *.

* Fiſher v. Stanhope, 1 Term Rep. 464.

UPON

P. P. plaintiff. } UPON reading the pe-
D. D. defendant. } tition of the *defendant*, (1) the copy of the ſheriff's warrant, the certificate of the keeper of the ſheriff's ward or priſon in and for the county of *Devon* (2), the affidavit of *E. F.* (3) the affidavit of *G. H.* and the notice and account thereto annexed (4); It is ordered, that the ſaid keeper ſhall carry the *defendant* before the judges who ſhall hold the next aſſizes in and for the ſaid *county*; and that a copy hereof be delivered to the *plaintiff*, or left for *him* at *his* uſual place of abode, at leaſt *fourteen* days before the ſaid aſſizes, that *he* may perſonally, or by *his* attorney, ſhew cauſe (if any *he has*) againſt the diſcharge of the ſaid *defendant* out of the cuſtody of the *ſheriff* of the ſaid *county*, as to the execution with which *he* ſtands charged at *his* ſuit, purſuant to the ſeveral acts of parliament made for the relief of debtors, with reſpect to the impriſonment of their perſons.

To bring the defendant up to be diſcharged under the lords act, in *the country*.

(1) For the rule.

(2) Of the cauſe of detainer.

(3) Of the ſignature of the defendant to the petition, and of the keeper to the certificate.

(4) Of the ſervice of the notice on the plaintiff.

UPON

The like, in town.

P. P. plaintiff. }
D. D. defendant. } UPON reading the petition of the *defendant*, (1) the certificate thereto (2) annexed, the affidavit of *E. F. gentleman* (3), the affidavit of *G. H.* and the notice thereto annexed (4); It is ordered, that the *plaintiff*, upon notice of this rule to be given to *him*, ſhall, upon *Saturday the 13th* day of *June inſtant*, at *Serjeant's-inn hall*, at the hour of *nine* in the morning of the ſame day, ſhew cauſe why the ſaid *defendant* ſhould not be diſcharged out of the cuſtody of the marſhal of the marſhalſea of this court, as to the execution at the ſuit of the ſaid *plaintiff*; And that the ſaid marſhal do bring the ſaid *defendant* to the ſaid place at the time aforeſaid.

(1) For the rule.
(2) The marſhal's certificate of the cauſe of detainer.
(3) Of the ſignature of the defendant to his petition.
(4) Of the ſervice of the notice on the plaintiff.

Remanding the defendant thereon.

P. P. plaintiff. }
D. D. defendant. } UPON reading the rule made in this cauſe, on *Friday* the *5th* day of *June inſtant* (1), and the affidavit of *A. B.* (2) It is ordered, that the *defendant* be remanded into the cuſtody of the marſhal of the marſhalſea of this court, until *Saturday the twentieth day of June next enſuing*; and that the ſaid marſhal do bring the ſaid *defendant* into

(1) The above rule.
(2) In oppoſition to the defendant's diſcharge.

into Serjeants-inn hall, at the hour of *nine* in the morning of the ſame day, for the purpoſes in the ſaid rule mentioned, upon notice of this rule in the mean time being given to the *plaintiff*, *his* attorney or agent.

P. P. plaintiff. }
D. D. defendant. } UPON reading the laſt rule (1), the affidavit of *C. D. gentleman* (2), *the affidavit* of *G. H. and the account thereto annexed, the affidavit of I. K. gentleman* (3), and no cauſe being ſhewn to the contrary; It is ordered, that the *defendant* be diſcharged out of the cuſtody of the marſhal of the marſhalſea of this court, as to this action.

Diſcharging the defendant.

(1) The above rule.

(2) Of the ſervice of the laſt rule.

(3) The affidavits filed by both parties.

THESE rules are founded on the act of parliament commonly called the *lords* act*, (which has been held *not* to extend to *qui tam* actions†) and the late act for the extenſion of

* 32 Geo. II. c. 28. ſ. 13.

† Hart, qui tam, v. Hawkins, 3 Burr. 1322; and Sir W. Black. 372. S. C.

it.

it*. The rule to bring the defendant up to be *diſcharged* is drawn up by the clerk of the rules, on the petition of the defendant, without any motion in court, or the ſignature of counſel; and the particular mode of obtaining it, and bringing the defendant up thereon, &c. may be found in the books of practice †.

If, when the defendant is brought up, he ſhould be *remanded* till a future day, the third of the above rules will be drawn up thereon; which ſhould be taken and left at the clerk of the papers' office for the marſhal (ſuppoſing the defendant to be in his cuſtody) who will thereon bring him up again accordingly; and if the defendant ſhould then be ordered to be *diſcharged*, a rule to the effect of the laſt of the above rules will be drawn up thereon, which muſt be taken to the clerk of the papers' office, and the marſhal will then immediately diſcharge the defendant accordingly.

But the defendant may be *remanded*, on the *undertaking* of the plaintiff (or, if he be out of England, of his attorney) to pay him his *groats*, *i. e.* 2 *s.* 4 *d.* a week, if remanded at the inſtance of one creditor; but if of two or more, then 1 *s.* 6 *d.*

* 33 Geo. III. c. 5.

† Tidd, 763; Impey, 470, 3d ed.

a week each*; for the court never allow leſs than the full money mentioned in the act†.

The undertaking ſhould be prepared, and ſigned by the plaintiff, ready againſt the defendant is brought up, and muſt be drawn correctly, and the money made payable every *Monday* ‡; and, being in the nature of a promiſſory note, is in practice always wrote on a promiſſory note ſtamp, and may be in the following form:

" In the King's Bench.

" Between *P. P. plaintiff,*

" and

" *D. D. defendant.*

" *I* do hereby undertake and promiſe to " pay to the above-named *D. D.* the ſum of " two ſhillings and four-pence weekly, and on " Monday in every week, ſo long as *he* ſhall " continue *a priſoner* in execution at *my* ſuit. " Dated this *fourteenth* day of *March*, 1795.

" *P. P.* the above-named *plaintiff.*"

When the defendant is brought up, the note muſt be delivered by the plaintiff himſelf to the defendant in court, with the firſt

* 32 Geo. II. c. 28. ſ. 14. † Loft, 348.

‡ Lench v. Pargiter, Doug. 67.

week's

week's payment, which is for the current week, as the next week's payment becomes due and muſt be paid on the *following Monday*; and therefore where it was not ſo paid, (though it appeared the non-payment happened through the miſtake of the plaintiff, in conſidering the firſt week's money, which he paid the defendant when he was brought up to the aſſizes, to be for the week *commencing* inſtead of *ending*, on the following Monday) the defendant was diſcharged*.

But if it is not convenient for the plaintiff to attend himſelf, an *affidavit* of his *ſignature* to the note, which may be drawn to the following effect, ſhould be annexed to the undertaking; and then the undertaking and affidavit muſt, in like manner, be delivered with the money by the plaintiff's attorney to the defendant in court, at the time he is brought up.

" In the King's Bench.

" Between *P. P. plaintiff,*

" and

" *D. D. defendant.*

" *A. B. of the city of Oxford, in the county of* " *Oxford, gentleman,* maketh oath and ſaith,

* White v. Heard, 27th April 1795, before Lord Kenyon, at chambers. See the Orders, p. 112 and 113.

" That

" That he ſaw the above-named *plaintiff* ſign " the undertaking hereunto annexed, and that " the *name P. P.* thereto ſubſcribed, *is* of the " proper *hand*-writing of the ſaid *plaintiff*."

When the groats become payable, to avoid the tricks often practiſed by the priſoners, and by which they ſometimes get diſcharged, the money had better not be paid to the priſoner, but to the *gaoler or turnkey* in whoſe cuſtody he may be, who indeed is the proper perſon to receive it for him *; but his receiving it, when the priſoner is intitled to his diſcharge for the non-payment of it, will not, it ſeems, affect the priſoner's right to ſuch diſcharge †.

The money muſt always be regularly paid on the *Monday*, and that before *ten o'clock* in the *evening*, for if it is not, the defendant will be immediately entitled to his diſcharge ‡; and may, on an affidavit of the non-payment, accompanied by a certificate of the gaoler of

* Per Buller, J. on a ſummons to diſcharge the defendant for non-payment of the groats. Bickley v. Tucker, 10th July, 1792.

† Fiſher v. Bull, 2 Term Rep. 36.

‡ Ibid.

the

the cauſe of his detainer, and an affidavit of the gaoler's ſignature thereto, upon application to the *court* in *term*, or to a *judge* in *vacation* *; obtain an order for his diſcharge for non-payment of the groats, on his executing the aſſignment of his effects.

And if the application is made in the vacation, in a *country* cauſe, the firſt order which is made on the attendance of the plaintiff's agent, on the defendant's ſummons to be diſcharged for the non-payment of the groats, or, if he does not attend on an affidavit of the ſervice of the ſummons on him, and the attendance thereon, is an order *niſi* to the effect of the firſt of the following orders; and then upon the attendance on the order niſi, or on an affidavit of the ſervice of it, if there be no attendance on it on the part of the plaintiff, an order *abſolute* is made for the defendant's diſcharge, to the effect of the laſt of the following orders.

" *P. P.* } Upon hearing the attornies or
" againſt } agents on both ſides, I order, that
" *D. D.* } the *defendant* be diſcharged out
" of cuſtody, for non-payment of two ſhillings

* Lench v. Pargiter, Doug. 67.

" and

" and four-pence weekly, purſuant to the *plain-*
" *tiff*'s undertaking, unleſs ſufficient cauſe be
" ſhewn to me to the contrary on or before
" *Monday the 27th day of April next*, at eleven
" o'clock in the forenoon, at my chambers in
" Serjeant's Inn. Dated the *19th day of April*,
" 1795.

" *Kenyon.*"

" *P. P.* against *D. D.* Upon hearing the attornies or agents on both ſides, I order, that the *defendant* be diſcharged out of
" the cuſtody of the *ſheriff of the county of De-*
" *von*, as to the execution at the *plaintiff*'s ſuit,
" for non-payment of two ſhillings and four-
" pence weekly, purſuant to the *plaintiff*'s un-
" dertaking, on the *defendant*'s executing *his*
" aſſignment. Dated the *27th* day of *April*,
" 1795.

" *Kenyon.*"

When this order is obtained, application ſhould be made to the *aſſociate* (with whom the defendant's ſchedule, &c. is lodged, on his

being brought up at the aſſizes) to prepare the *aſſignment*, which he will do, and ſend it down to the gaoler to be *executed* by the defendant; and when that is done, and the order is delivered to the gaoler, the defendant will be *diſcharged* accordingly.

But if the defendant is brought up in *town*, and the plaintiff reſides there, the order is *abſolute* at once on the *firſt* ſummons, either upon the attendance of the plaintiff's attorney or agent, or on an affidavit of the ſervice and attendance of the ſummons; and the *clerk of the rules* (with whom the papers are lodged on the defendant's being brought up) prepares the aſſignment thereon, upon the *execution* of which the defendant will of courſe be *diſcharged*.

UPON

P. P. plaintiff. } UPON reading the affi-
D. D. defendant. } davit of the *plaintiff*, the certificate thereto annexed, the affidavit of *T. B.* and the ſeveral notices thereto annexed; It is ordered, that the marſhal of the marſhalſea of this court, upon notice of this rule to be given to him, or his deputy, ſhall, upon *Saturday*, the *fifteenth* day of *November inſtant*, bring the *defendant* into *Serjeant's Inn hall*, at the hour of *nine* in the morning of the ſame day, together with a certificate or copy of cauſes upon which *he is* detained or charged in his cuſtody. And it is further ordered, that the ſaid *defendant* ſhall then and there deliver in a ſchedule or inventory of ſuch effects as *he* may be now, or *was* at the time of *his* firſt impriſonment in this action, or at any time ſince *hath* been poſſeſſed of or intitled unto, and of all incumbrances affecting the ſame; and ſhall then and there upon oath, to be then and there adminiſtered to *him*, certify the ſame to the court, and duly aſſign the ſame for the benefit of the plaintiff or plaintiffs, as the ſaid court

To bring the defendant up to aſſign his effects, under the compulſive clauſe in the lords act.

ſhall direct, upon notice of this rule in the mean time being given to them or their attornies.

THIS rule is founded on that part of the *lords* act *, commonly called the *compulſive* clauſe, as well as on the late act for the extenſion of it †; and as the mode of obtaining the rule does not ſeem to be pointed out in any of the books of practice, it may not be uſeleſs here to obſerve, that in order to obtain it, ſuppoſing the defendant to be in the cuſtody of *the marſhal*, a certificate of the cauſes of his detainer muſt be got from the clerk of the papers' office, and the following *notice* and *petition* ſhould then be prepared and ſigned by the plaintiff, and a copy of the notice ſerved at the clerk of the papers' office for the marſhal; and on the defendant, and alſo on or left at the dwelling-houſe of every creditor, at whoſe ſuit the defendant appears by the certificate to be detained in cuſtody; and an *affidavit* to the following effect ſhould be made of the ſervice of the notice, &c.:

* 32 Geo. II. c. 28. † 33 Geo. III. c. 5. ſ. 3.

In

In the King's Bench.

Between *P. P. plaintiff*,

and

D. D. defendant.

Notice of the application for the rule.

Take notice, that *I* intend, on the *firſt day of next Michaelmas term*, or as ſoon after as *I* can be heard, to petition his Majeſty's court of King's Bench, at Weſtminſter, for a rule or order of the ſaid court, directing (1) the above-named *defendant D. D.* to be brought up into this honourable court, in order that *he* (2) may be compelled to diſcover and deliver into the ſaid court upon oath a true account in writing, ſigned by *him*, (3) of all *his* (4) real and perſonal eſtate, and of all incumbrances affecting the ſame, according to the beſt of *his* (5) knowledge and belief, in order that *his* (6) eſtate and effects may be deveſted out of *him*, (7) and may by the judges of the ſaid court be ordered to be aſſigned and conveyed in manner and for the purpoſes declared in and by a certain act of parliament, made and paſſed in the thirty-ſecond year of the reign of his late Majeſty King George the Second, intituled, "An

N. B. The defendant's copy of the notice ſhould be varied, as under.

(1) You.

(2) You.

(3) You.
(4) Your.

(5) Your.

(6) Your.

(7) You.

" act for the relief of debtors, with reſpect to " the impriſonment of their perſons, and to " oblige debtors, who ſhall continue in exe- " cution in priſon beyond a certain time, and " for ſums not exceeding what are mentioned " in the act, to make diſcovery of, and deli- " ver upon oath, their eſtates for their creditors " benefit;" and alſo in and by a certain other act of parliament, made and paſſed in the thirty-third year of the reign of his preſent Majeſty, intituled, " An act for the further " relief of debtors, with reſpect to the impri- " ſonment of their perſons, and to oblige deb- " tors who ſhall continue in execution in pri- " ſon beyond a certain time, and for ſums not " exceeding what are mentioned in the act, " to make diſcovery of, and deliver upon oath, " their eſtates for their creditors benefit." Dated the *ſeventeenth* day of *October* 1794.

P. P. the plaintiff above-named.

Witneſs *T. B.*

In

In the King's Bench.

Petition for the rule.

Between *P. P. plaintiff*,
and
D. D. defendant.

To the Right Honourable *Lloyd Lord Kenyon*, Lord Chief Juſtice of his Majeſty's Court of King's Bench, at Weſtminſter, and the reſt of the Judges of the ſame Court.

The humble petition of *P. P. of Tower Hill, in the city of London, upholſterer, the above-named plaintiff*;

Sheweth,

That *D. D.* the above-named *defendant, is a priſoner* in the cuſtody of the marſhal of the marſhalſea of this honourable court, charged in execution at the ſuit of your *petitioner*, for the ſum of *one hundred and ninety-three pounds*, as appears by the annexed certificate.

That your *petitioner apprehends he is* authorized and impowered, by virtue of the compulſive clauſe in an act of parliament [*So through the titles of the acts, as in the notice*] to

compel the above-named *defendant D. D.* to deliver into this court, upon oath, a true account in writing, ſigned by *him* the ſaid *defendant*, of all *his* real and perſonal eſtate, and of all incumbrances affecting the ſame, according to the beſt of *his* knowledge and belief, in order that *his* eſtate and effects might be deveſted out of *him*, and aſſigned and conveyed in manner and for the purpoſes declared in the ſaid ſeveral acts.

Your *petitioner* therefore humbly *prays* the rule or order of this honourable court for the above-named *defendant D. D.* to ſhew cauſe why *he* ſhould not conform *himſelf* to the directions of the ſaid acts.

And your *petitioner* ſhall ever pray, &c.

P. P. the above-named plaintiff.

In

In the King's Bench.

Between *P. P. plaintiff*,
and
D. D. defendant.

Affidavit of the ſervice of the notice, &c.

T. B. clerk to Meſſrs. D. and H. of Mark Lane, in the city of London, attornies for the *plaintiff* in this cauſe, maketh oath and ſaith, That the *name P. P.* ſet and ſubſcribed at the foot of the petition hereto annexed, is the proper hand-writing of *P. P. the plaintiff* and *petitioner* in this cauſe. And this deponent further ſaith, that he did, on the *ſeventeenth* day of *October laſt*, ſerve the above-named *defendant D. D.* with a true copy of the notice hereunto annexed, marked with the letter *(A)*, and which ſaid copy was ſigned by the ſaid *P. P. the plaintiff* and *petitioner* in this cauſe, and witneſſed by this deponent, by delivering to and leaving ſuch copy of the aforeſaid notice with the ſaid *defendant D. D. himſelf*. And this deponent further ſaith, that he did, on the *ſaid ſeventeenth* day of *October laſt*, ſerve *E. F. G. H.* and *J. K.* being all the *plaintiffs* in the ſeveral actions in the annexed certificate named

named (except the *ſaid P. P. the plaintiff* and *petitioner* in this cauſe) and alſo *William Jones, eſquire*, the marſhal of the marſhalſea of this honourable court, with true copies of the notice hereunto annexed, marked *(B)*, and which ſaid copies of the ſaid laſt-mentioned notice were reſpectively ſigned by the ſaid *P. P. the plaintiff and petitioner* in this cauſe, and witneſſed by this deponent: *by delivering to, and leaving with each of them the ſaid E. F. and G. H. one of ſuch copies of the ſaid laſt-mentioned notice; and by delivering to and leaving with the ſervant of the ſaid J. K. at the houſe of the ſaid J. K. in Parliament-ſtreet, Weſtminſter, another of ſuch copies of the ſaid laſt-mentioned notice; and by delivering to and leaving another of ſuch copies of the ſaid laſt-mentioned notice with Mr. John Hill, for the aforeſaid marſhal, at the office of the clerk of the papers of the ſaid marſhal, in Saint George's Fields, in the county of Surrey.*

WHEN this is done, the petition and affidavit ſhould be lodged at the clerk of the

the rules' office, and as ſoon as *twenty* days, from the time of the ſervice of the notice are expired, the clerk of the rules draws up the above rule thereon, which muſt be ſerved on the defendant and creditors, in like manner as the notice was ſerved, and the *original* rule ſhould be left, either with the clerk of the papers, or the turnkey of the priſon, and an *affidavit* to the following effect of the ſervice of the rule made and delivered to the clerk of the rules, before or at the time the rule directs the defendant to be brought up.

Affidavit of the ſervice of the rule.

" In the King's Bench.

" Between *P. P. plaintiff*,

" and

" *D. D. defendant.*

" *W. S. D. clerk to Meſſrs. D. and H. of* " *Mark Lane, in the city of London, attornies* " *for the plaintiff* in this cauſe, maketh oath " and ſaith, That he did, on *Tueſday* the *eleventh* " day of *November inſtant*, ſerve the above- " named *defendant D. D.* and alſo *I. K. E. F.* " *and G. H.* (being all the plaintiffs at whoſe " ſuit the ſaid *defendant D. D. is* detained in " the cuſtody of the marſhal of this honour-

" able

" able court, except the *plaintiff* in this cauſe)
" with a rule of this honourable court, made
" in this cauſe, on *Friday* the *ſeventh* day of
" *November inſtant*, whereby it is ordered that
" the marſhal [*ſo through the rule,*] *by deliver-*
" *ing to, and leaving a true copy of the ſaid rule*
" *at the houſe of the ſaid defendant D. D. in Saint*
" *George's Fields, in the county of Surrey, with a*
" *perſon who informed this deponent ſhe was his*
" *wife, and at the ſame time ſhewing her the ſaid*
" *original rule; and by delivering to, and leaving*
" *another copy of the ſaid rule at the houſe of the*
" *ſaid J. K. in Parliament Street, Weſtminſter,*
" *with a ſervant of the ſaid J. K. and at the*
" *ſame time ſhewing ſuch ſervant the ſaid original*
" *rule; and by delivering to and leaving with the*
" *ſaid E. F. and G. H. reſpectively, a true copy*
" *of the ſaid rule, and at the ſame ſhewing them the*
" *ſaid original rule.* And this deponent further
" ſaith, that he did, on the *morning of Friday*
" *the fourteenth day of November inſtant*, deliver
" the ſaid original rule itſelf to, and leave it
" with, the turnkey of the marſhal of the
" marſhalſea of this honourable court, at the
" lobby of the ſaid priſon."

UPON

P. D.
R. D.
S. D.

UPON reading the *affidavit* of the *defendant and another, and the paper writing thereto annexed* (1), It is ordered, that Mr. *A. B.* late attorney for the ſaid *defendant*, ſhall, upon *Saturday* [*&c.*] anſwer the matters contained in the ſaid *affidavit*—upon the motion of Mr. *Cowper*.

For an attorney to anſwer the matters of complaint in an affidavit.

(1) Of the facts.

P. D.
R. D.
S. D.

UPON reading the rule made in this cauſe, on *Friday*, [*&c.*] (1) It is ordered, that the *firſt day of the next term* be further peremptorily given to Mr. *A. B.* late attorney for the ſaid *defendant*, to anſwer the matters contained in the *affidavit* in the ſaid rule mentioned. And it is further ordered, that the affidavits which the ſaid Mr. *A. B.* intends to read at the time of anſwering the matters, ſhall be filed *four* days before the next term—upon the motion of Mr. *Baldwin*.

Enlarging the time for anſwering it.

(1) The above rule.

P. D.
R. D.
S. D.

UPON reading the rule made in this cauſe, on *Friday*, [*&c.*] (1) *the ſubſequent rule made thereon* (2), the *affidavit of A. B. gentleman*, the *affidavit of G. H.*

Diſcharging the rule, upon the attorney's paying certain coſts.

(1) The firſt rule.

(2) The ſecond rule.

H. gentleman and another (3), and upon hearing counſel for the *defendant*, and alſo for the ſaid Mr. A. B. in the ſaid rule named; It is ordered, that *the ſaid Mr. A. B. do forthwith pay to the defendant D. D. or to Mr. F. his now attorney, the coſts the ſaid defendant hath been put unto in theſe cauſes, to be taxed by Mr. Benton; and it is referred to the ſaid Mr. Benton to tax the ſaid defendant his coſts occaſioned by this application: which coſts, when taxed, ſhall alſo be paid by the ſaid Mr. A. B. to the ſaid defendant, or to the ſaid Mr. F. his now attorney*, and thereupon the ſaid rule be diſcharged—upon the motion of Mr. *Cowper* for the defendant, and Mr. *Baldwin* for Mr. A. B.

(3) The affidavits on both ſides.

WHEN an attorney has miſconducted himſelf in the courſe of a cauſe or otherwiſe towards his client, the court will interpoſe its aid on behalf of the perſon injured, and grant him relief in a ſummary way by motion, according to the circumſtances of the caſe; and will therefore, on a motion, ſupported by an *affidavit* of the facts, grant the above rule to anſwer the matters of the com-

plaint, and afterwards make ſuch ultimate rule thereon, as the juſtice of the caſe may require, and will generally make the attorney pay the *coſts* incurred by his improper conduct *. Indeed the firſt of theſe rules is frequently a preliminary one to a rule againſt the attorney for an *attachment*, where he has been guilty of groſs fraud and corruption, injuſtice to his client, or other diſhoneſt practice †.

But if it does not appear that the attorney was *groſsly negligent, ignorant, or intentionally blameable*, the court will not proceed againſt him in a ſummary way ‡; and it may be obſerved, that where they do, and give a *ſpecific relief* by an order in a caſe, where by law the party is *not* intitled to *two* different remedies, he will not be ſuffered to purſue a ſecond recompence; and therefore if he afterwards brings an action for the ſame cauſe, the court will ſtay the proceedings in ſuch action, though it is otherwiſe where *two* different remedies *are* given by law, as where an arreſt is illegal, for there the court only correct the irregularity,

* And ſee Loft 84; and Doe, ex. dim. Jupp v. Andrews, Cowp. 845.

† 4 Black. Com. 284. 7th ed.

‡ Pitt v. Yalden, 4 Burr. 2060.

and

and leave the party to his remedy for the falſe impriſonment *.

If a party called on by a ſimilar rule to the above one to anſwer the matters in an affidavit, or by a rule niſi, cannot be prepared, or is not ready to anſwer the matters, or ſhew cauſe by the day named in the rule, the court will in general, on a ſuggeſtion of the reaſon, without any affidavit, give *further time*, and then a rule to the effect of the ſecond of the above rules is drawn up thereon. But the court commonly direct it to be made a part of the enlarged rule, that the *affidavits* intended to be read at the time of anſwering the matters, or ſhewing cauſe, ſhall be filed by *a particular* day, to give the other party an opportunity of taking the office copies in time. And every rule enlarged to the ſubſequent term is fixed for a *peremptory* day in this manner, the firſt five for the firſt day, the ſecond five for the ſecond day, and ſo on; and after the term a liſt of the enlarged rules, with the times when they are appointed to come on, is made by the clerk of the rules, and ſtuck up in his office, and a copy of it is delivered to the judges the day before the beginning of every term †.

* Cameron et al. v. Reynolds Under Sheriff, Cowp. 403.
† Order H. T. 6 Geo. III.

UPON

P. } UPON reading the affidavit of *A. B.* *gentleman, and another*, (1) and the *warrant of attorney* therein mentioned, It is ordered, that the *plaintiff* have leave to enter up judgement againſt the *defendant* upon the ſaid *warrant of attorney*—upon the motion of Mr. *Gibbs*.

To enter up judgement on an old warrant of attorney.

(1) Of the facts.

IF a warrant of attorney has been executed *above a year*, judgement cannot afterwards be entered up on it without leave of the court, by obtaining the above rule, the motion for which is of courſe, on an *affidavit* of the execution of the warrant of attorney, of the money due on it, and of the defendant's being alive.

So, if the warrant of attorney be given to a *feme ſole*, and ſhe afterwards *marries*, leave muſt in like manner be obtained, on an *affidavit* of the marriage, to enter up the judgement in the name of the huſband and wife; and if entered up without, it will be *irregular*, and the court will therefore ſet the judgement aſide *.

And if a warrant of attorney be given to *two* perſons, and *one* of them *dies* before the judge-

* Marder et Ux. v. Lee, 3 Burr. 1469; and Loft 330.

ment is entered up, the court will, on an *affidavit* of the circumſtances, give the ſurvivor leave to enter it up*.

* Todd v. Dodd, 1 Wil. 312; and Sayer, 5. S. C.

THE END.

ERRORS.

Page 45, line 1, *inſert before the word* it, "upon reading the affi-"davit of A. B."

P. 46, l. 21, *for* "without any," *inſert* "on an."